THE NORTHERN IRELAND LAW REPORTS

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(p. 1 to 31.)

EDITED BY FRANCIS NEWARK, ESQ.,
BARRISTER-AT-LAW.

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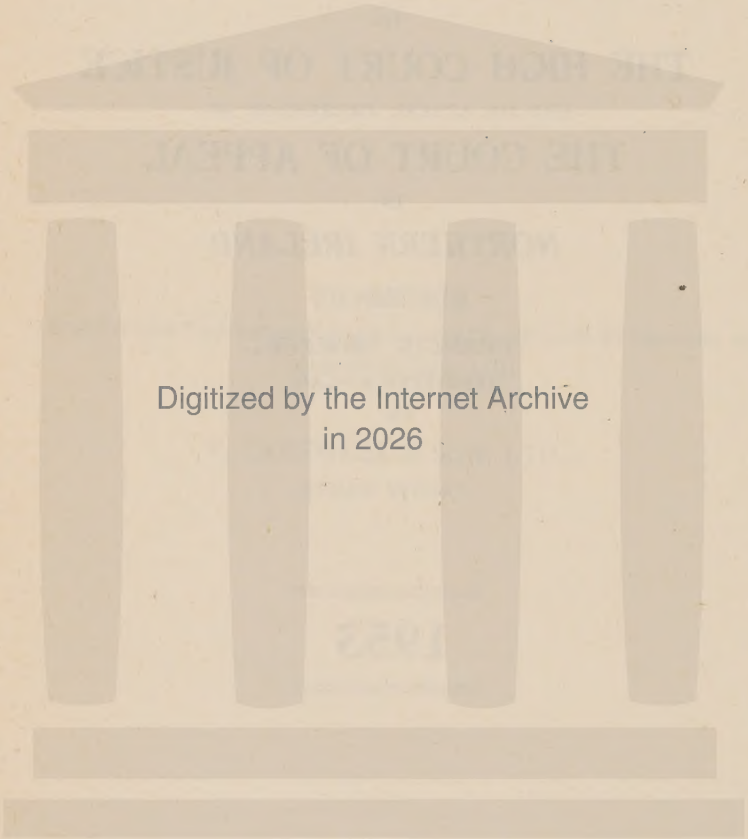

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ERRATUM.

Page 160, line 24—For "Corporation" read "respondent."

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HOLLAND AND OTHERS v. ANTRIM COUNTY COUNCIL AND OTHERS (1).

Planning—Development—Proposed use of dwelling-house as residential rescue home for girls—Use of premises for different purpose—Planning (Interim Development) Act (Northern Ireland), 1944 (7 & 8 Geo. 6, c. 3), s. 9 (1).

The trustees of a charity proposed to use premises previously used and occupied as a dwelling-house with grounds for establishing there a residential rescue home for girls.

Held, that use for such a purpose would constitute a development within the meaning of s. 9 (1) of the Planning (Interim Development) Act (Northern Ireland), 1944.

ORIGINATING SUMMONS.

The plaintiffs as trustees of the Malone Place Rescue and Maternity Home entered into a conditional agreement to purchase a dwelling-house and grounds known

(1) In the Chancery Division before Black L.J.; Dec. 18, 1952; Feb. 20, 1953.

as Unagh at Jordanstown in the County of Antrim. The property had been previously used and occupied as a private dwelling-house. It was the plaintiffs' intention to use the premises to accommodate girls between the ages of 16 and 24 years or thereabouts whose circumstances and associations exposed them to moral danger, or who were of bad moral character, or who had been convicted of prostitution or other offences and had been bound over by the court on condition that they entered and remained in the home. It was proposed that the girls would receive suitable training and instruction and would be under strict control and discipline, and every measure short of physical compulsion would be used to prevent the girls leaving the home.

In case it should be deemed that the proposed use of the property would be a use for a purpose different from the purpose for which it was last being used and accordingly would amount to a "development" of the property within section 9 (1) of the Planning (Interim Development) Act (Northern Ireland), 1944 (1), the plaintiffs applied to the Antrim County Council under the provisions of that Act for permission to use the property for the purposes contemplated, but they reserved their right to contend that such permission

(1) Planning (Interim Development Act (Northern Ireland), 1944, s. 9 (1):—

"In this Act the following "expressions have the meanings "hereby assigned to them, that "is to say:—

"'development', where used in "relation to land, includes any "building operations or rebuilding "operations, and any use of the "land or any building thereon for "a purpose which is different from "the purpose for which the land "or building was last being used:

"Provided that—

"(i) the use of land for the purposes of agriculture, whether "as arable, meadow, pasture "ground, garden or orchard, "or for the purposes of a "plantation or a wood, or for "the growth of saleable under-"wood, and the erection or "use for any of those purposes "of any building which may "be or is occupied together "with the land so used, shall "not be deemed to be a "development of that land or "building; and

"(ii) the use of the land "within the curtilage of a "dwelling-house for any fresh "purpose shall not be deemed "to be a development of that "land if the purpose is in-"cidental to the enjoyment "or amenities of the dwelling-"house as such."

was not necessary. The County Council refused permission on the ground that the proposed use of the premises would be unsuitable and detrimental to the standard of valuation of the adjoining residential premises and to the amenities of the area. From this refusal the plaintiffs appealed to the Ministry of Health and Local Government, again contending that on the correct interpretation of the Act of 1944 the permission of the County Council was not necessary. The Ministry upheld the decision of the County Council and disallowed the appeal.

The plaintiffs now brought this summons for the determination of the question whether on the true construction of the Planning (Interim Development) Act (Northern Ireland), 1944, the use of the said dwelling-house and premises as a residential home for girls in the manner proposed by the plaintiffs constituted a "development" within the meaning of that Act.

McVeigh Q.C. and *Gibson* for the plaintiff trustees.
Watt for the Antrim County Council.
Reid for the Belfast Rural District Council.
Harrison Q.C. and *Lowry* for the Ministry of Health and Local Government.

Cur. adv. vult.

BLACK L.J. [His Lordship stated the facts and continued] :

The point accordingly on which the plaintiffs seek the decision of the court is whether the proposed use of the premises constitutes a "development" within the meaning of the Planning (Interim Development) Act (Northern Ireland), 1944, which for the sake of brevity I shall refer to simply as the Act of 1944.

The term "development" in the Act of 1944, where used in relation to land, is defined by section 9 (1) of the Act as including any building operations or rebuilding operations and any use of the land or any building thereon for a purpose which is different from the purpose for which the land or building was last being used. The question in the present case then is

whether the proposed use of the premises would be for a purpose different from the purpose for which they were last being used.

There is no express provision in the Statute as to the degree of difference of purpose which would be sufficient to constitute a " development " within the definition, or as to the criteria by which it is to be decided whether the purpose for which premises are being used is different from the purpose for which they were previously used. In these circumstances we must see if there is anything in the Statute from which we may infer the intention of the Legislature : and if we do not find anything in the Statute to help us to draw an inference one way or another we shall have to fall back upon what meaning the expression used in the definition would have in ordinary every day speech.

On behalf of the plaintiffs it was urged that the word " purpose " contained in the definition of "development" in section 9 (1) of the Act of 1944 should be understood in a broad sense ; that the Legislature had in mind broad classifications of purposes, e.g., agricultural, manufacturing, merchanting and residential. It was contended that the purpose for which the premises are proposed to be used by the plaintiffs is in essence a residential one and so not different from the purpose for which they were previously used. The difficulty about this contention appears to me to be twofold. In the first place there is the difficulty of listing the precise broad categories of purpose which it is suggested that the Legislature intended, and in the second place there is difficulty in finding any trace in the Act of these suggested broad divisions. In proviso (i) to the definition of development in section 9 (1) the Act speaks of the purposes of a plantation or a wood, so these must constitute a type of purposes. And proviso (ii) enacts that the use of land within the curtilage of a dwelling-house for any fresh purpose shall not be deemed to be a development of that land if the purpose is incidental to the enjoyment or amenities of the dwelling house as such. It seems to me that a change of user of land within the curtilage of a dwelling house for a purpose incidental to the enjoyment or

amenities of the dwelling-house as such is rather unlikely to be found to be a change from one to another of the broad categories which the plaintiffs suggest. I think the fair conclusion from proviso (ii) is that the Legislature was contemplating much narrower categories of user than those suggested by the plaintiffs.

But, the plaintiffs say, what is the alternative ? If their view is not accepted they say that the only logical alternative is to construe the phrase strictly and that if the phrase is construed strictly we must be driven to manifest absurdities which cannot possibly have been within the intention of the Legislature. Can it be that if premises have for years been used as a confectioner's shop the permission of the planning authority will be necessary if the occupier desires to carry on the trade of selling cigarettes as well as confectionery? Will it be necessary to obtain permission if a sports club desires to use its grounds for hockey instead of for football or vice versa ? One can pose an infinity of problems suggesting on the one hand cases in which it seems ridiculous that permission should have to be applied for, and on the other hand cases on the other side if the line where it might well be desirable in view of the objects of the Planning Acts that permission from the planning authority should have to be sought. If it is difficult to know where exactly to draw the line it would seem to me that in view of the objects of the Planning Acts the line ought perhaps to be drawn pretty strictly. The general objects for which planning schemes may be made are set out in section 1 of the Planning and Housing Act (Northern Ireland), 1931. One of these objects is to secure proper amenity in connection with the use of the land to which the scheme relates and also it may be of neighbouring lands. A change of use of land formerly used as a hockey field or a cricket field to, for example, a greyhound racing track might very possibly interfere with the amenities of the neighbourhood : a change of its use to use as a football ground by a small local club would hardly be likely to do so : but a change to such use by a highly organized professional club attracting large crowds to

its matches might well constitute such an interference. It would seem natural that the Legislature should think fit to endow the planning authority with wide powers regarding such changes of user. It may be contended that such a construction of the Statute would, to borrow the metaphor used by Morris L.J. in *Buckingham County Council v. Callingham* (1), amount to endowing the planning authority with a giant's strength. But the provisions of section 2 (6) of the Act of 1944 entitling a person aggrieved by the planning authority to appeal to the Ministry and to have his appeal heard and determined by the Ministry, or if he so desires by an independent person appointed by the Ministry, should be an effectual curb upon any high-handed use of its power by the planning authority and should prevent it from using its strength tyrannously like a giant.

So far as I am aware there is little assistance to be gained from reported decisions on the point which we have to consider. The nearest approach to it which I have been able to find is in the judgment of Lord Greene M.R. in *Taylor v. Brighton Borough Council* (2). The definition of " development " in our Act of 1944 is copied from the definition of the term in section 53 of the English Town and Country Planning Act, 1932. In *Taylor's* case Lord Greene quotes section 1 of the Act of 1932 which describes the general object of a planning scheme to be the controlling of the development of the land comprised in the area to which the scheme applies, the securing of proper sanitary conditions amenity and convenience . . . . and generally the protecting of existing amenities whether in urban or rural portions of the area. He then approves of the view expressed by Lord Goddard C.J. in the Divisional Court that these words are extremely wide. Then after quoting the definition of development in section 53 he speaks as if there could be no doubt but that the conversion into a fun fair of premises formerly used as a garage would constitute a development within the definition. No doubt section 1 of the English Act of

(1) [1952] 2 Q.B. 515, 529. (2) [1947] K.B. 736, 742.

1932 is not in precisely the same terms as section 1 of the Northern Ireland Act of 1931. It may be somewhat more widely expressed, though it must not be overlooked that by virtue of section 9 (2) of the Act of 1944 the word development when used in section 1 of the Act of 1931 is to be given the meaning attached to it by section 9 (1) of the Act of 1944. But I think that the general tenor of Lord Greene's observations indicates that in his opinion the definition of the word development is to be read as a somewhat stringent one and not in the wide general sense contended for in the present proceedings by the plaintiffs.

The English Town and Country Planning Act, 1947, repealed the Act of 1932 and introduced a new definition of the term "development." By section 12 (2) of the Act of 1947 development is defined as meaning the carrying out of building, engineering, mining or other operations in, on, over or under land or the making of any material change in the use of any buildings or other land. It will be noticed that here the phrase "the making of any *material* change" is substituted for the former phrase "the use of the land "or any building thereon for a purpose which is "different from the purpose for which the land or "building was last being used." It looks as if the qualifying adjective "material" was introduced to relax a provision which the Legislature considered in 1947 to have been too stringent. I do not think that it could be seriously contended that the definition in the Act of 1947 was as stringent as the definition in the Act of 1932. Even if we had to apply the definition in the English Act of 1947 to the present case I think that the disposition in England would to be to hold the proposed change to be a material change in the user of the premises. Under paragraph (*f*) of the proviso to section 12 (2) of the Act of 1947 in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Minister the use thereof for any other purpose of the same class shall not be deemed for the purposes of the Act to

involve development of the land. In pursuance of this provision a schedule of classes of uses was specified in the Town and Country Planning (Use Classes) Order, 1948, S. I. 1948 No. 954 and this Order has now been superseded by the Town and Country Planning (Use Classes) Order, 1950, S. I. 1950 No. 1131. In this Order one of the classes of use (Class XI) is use as boarding or guest house, a residential club or a hotel providing sleeping accommodation. Another class (Class XII) is use as a residential or boarding school or a residential college. And another class (Class XVI) includes use as a home, hostel or institution in which persons may be detained by order of a court or which is approved by one of His Majesty's Principal Secretaries of State for persons required to reside there as a condition of a probation or a supervision order. Of course I recognize that even under the English legislation a change of use from a purpose under one class to a purpose under another class may not necessarily amount to such a " material change " as to constitute a development as defined in section 12 (2) of the Act of 1947. And I also recognize that one cannot legitimately construe a phrase used in the Northern Ireland Act of 1944 by a phrase used in the English Act of 1947 or by an order made under that Act. But if we are driven back to decide what the meaning in ordinary every day speech is of the expression " any use for a " purpose which is different from the purpose for which " the building was last being used " I do not think that we should close our eyes entirely to the interpretation which other members of the English speaking community appear to have attached to these or similar words.

In the result I cannot find any indications in the Northern Ireland legislation pointing to the view contended for by the plaintiffs as being preferable to that contended for by the defendants. The scope and intention of the legislation appear to me to point rather the other way. And if we look for the views expressed in the courts in England upon the analogous English legislation again we find no support for the

plaintiffs' views—any slight indication that we find of judicial opinion appears to point rather in the contrary direction. If in the plaintiffs' favour it is assumed that a consideration of the other provisions of the Northern Ireland legislation and of judicial opinion in England affords no leading which the court could safely follow as to the meaning of the phrase which we have to consider in the definition of the word development in section 9 (1) of the Act of 1944, then we are driven back to try to determine how, according to the ordinary usage of the English language, that phrase should be applied to the circumstances of the present case. Of this I cannot think that there can be really any doubt. The premises have heretofore been used as a gentleman's private residence. The use proposed to be made of them by the plaintiffs is as a residential institution for the training and reformation under discipline of wayward girls including girls who have been convicted of prostitution and other offences. In my opinion any educated user of the English language would have little hesitation in saying that in ordinary parlance and in the ordinary and natural sense of the words used in the definition the proposed use of the premises is for a purpose which is clearly different from the purpose for which they were last being used. And when one reads the Acts of 1931 and 1944 it seems to me that this construction of the definition of the word "development" is entirely consonant with the purpose and objects of those Acts.

I shall accordingly answer the question submitted in the summons in the affirmative.

Order accordingly.

Solicitors for the plaintiffs: *Cleaver, Fulton & Rankin.*

Solicitor for the County Council: *Samuel Anderson.*

Solicitor for the Belfast Rural District Council: *Wm. E. Robinson.*

Solicitor for the Ministry: *Chief Crown Solicitor.*

S.M.M.

MULGREW v. O'BRIEN (1).

Practice—Striking out pleading—Motion to strike out statement of claim as raising matters previously decided—Grounds for relief not in issue in previous proceedings—Previous statement of claim struck out as unintelligible.

Practice—Costs—Costs of previous actions not paid—Jurisdiction of court to order stay—Jurisdiction of court to order security for costs.

Pleading—Conveyance—Averment that one party was mentally incapable—Necessity for averment that incapacity was known or should have been known by other party.

The plaintiff commenced an action to set aside a conveyance of certain lands by his father to the defendant in 1947 on the grounds of the father's mental incapacity.

The defendant sought to have the statement of claim struck out on the ground that it sought to raise anew questions already decided between the parties by a court of competent jurisdiction and was an abuse of the process of the court; alternatively that it disclosed no reasonable cause of action and was frivolous and vexatious; alternatively that the plaintiff should give security for the defendant's costs.

In support of his application the defendant deposed that the conveyance of 1947 had been in issue before the courts on four occasions, viz. (i) proceedings by equity civil bill in 1948 by the father against the defendant which were settled on the footing that if the father paid £500 between November 1, 1948, and December 31, 1948, (a condition which was not fulfilled) the defendant would convey the lands to the plaintiff or his nominee; (ii) proceedings for trespass on the lands in question begun by the defendant in April 1949 against the father and the plaintiff in which the defendant was awarded damages and granted an injunction against the father and the plaintiff; (iii) proceedings in ejectment begun by the defendant in October 1949 after the death of the father in which the defendant obtained an order for possession against the plaintiff; (iv) proceedings begun by the plaintiff in the High Court in 1950 for possession of deeds and damages on the footing that the conveyance of 1947 was intended to be a mortgage, in which the statement of claim was struck out on the grounds (*a*) that it sought to raise anew matters already decided by a court of competent jurisdiction:

(1) In the Queen's Bench Division before Black L.J.; Mar. 7, 1952; Jan. 16, 1953.

(*b*) that it was unintelligible, frivolous and vexatious, (*c*) that it disclosed no cause of action.

The defendant further deposed that he had never succeeded in recovering any of the costs awarded to him in the three last mentioned proceedings.

Held, that the issue raised in the present action, viz.the mental incapacity of the father, was not an issue raised in the equity civil bill proceedings or in the ejectment proceedings, and in so far as it was raised in the previous High Court proceedings it was contained in a pleading which was struck out as unintelligible, and accordingly the present claim should not be struck out as seeking to raise anew matters already decided.

An order striking out a claim as unintelligible and accordingly dismissing the action is no bar to a subsequent action putting forward an intelligible claim.

Held, further, that the fact that the grounds for relief now put forward by the plaintiff were not relied on by the father in the equity civil bill proceedings, or by the father or by the plaintiff in the trespass proceedings, or by the plaintiff in the ejectment proceedings was no ground for dismissing the present action.

A claim for equitable relief is not barred by a judgment in an earlier suit seeking the same relief but based on a different equity. *Semble* that section 96 of the Civil Bill Courts (Ireland) Act, 1851, does not entitled a defendant to raise an equitable defence based on an equity which would not entitle him to simple and unconditional relief.

Held, further, that though the effect of the plaintiff's case was to assert that the conveyance of 1947 was merely voidable, neither the institution by the father of the equity civil bill proceedings nor his consent to the agreement by which those proceedings were settled amounted to an acceptance and confirmation of the position that he was mentally competent to enter into and understand business transactions.

Held, further, that since the present action was not substantially the same as any previous action between the parties, even though arising out of the same transaction, there was no jurisdiction to stay the present action on the ground that the costs given against the plaintiff in previous actions had not been paid, nor was there any jurisdiction to order the plaintiff to give security for costs in the present action.

Held, however, that the plaintiff's statement of claim disclosed no cause of action since it omitted to aver that the defendant knew or should have known of the mental incapacity of the father, and that accordingly the statement of claim must be set aside, reserving liberty to the plaintiff to deliver an amended statement of claim.

MOTION by the defendant for an order that the plaintiff's statement of claim be struck out as disclosing no reasonable cause of action and being

frivolous and vexatious and an abuse of the process of the court and that the action be stayed or dismissed, or alternatively for security for costs.

The facts appear sufficiently in the headnote and in the judgment.

Moody for the defendant.

The plaintiff appeared in person.

Cur. adv. vult.

BLACK L.J.: This is an application on the part of the defendant for an order—

(*a*) that the plaintiff's statement of claim may be struck out on the ground that it discloses no reasonable cause of action and is frivolous and vexatious: or alternatively on the ground that it seeks to raise anew questions already decided between the parties by a court of competent jurisdiction and is an abuse of the process of the court.

(*b*) that the plaintiff's action be stayed or dismissed.

(*c*) alternatively for an order that the plaintiff do give security for the defendant's costs.

The statement of claim, which is signed by the plaintiff himself, is a somewhat amateurish document, drafted without any very skilled legal assistance. It states that the plaintiff is heir at law and sole executor of his father, Francis Mulgrew, who died on October 10, 1949. It complains that at or about the month of September, 1947, the said Francis Mulgrew (whom I shall refer to as Francis Mulgrew senior) is alleged to have executed a conveyance of certain lands in County Tyrone and a transfer of certain other lands in the same County to the defendant. It asserts that at the time of the execution of the conveyance Francis Mulgrew senior was not capable of understanding or signing any document and that from September 1947, until his death, he did not nor was he capable of

understanding that a conveyance and transfer of the said lands had been executed in favour of the defendant. The plaintiff claims the return of all the land mentioned. This is in effect a claim that the transactions be set aside and the lands revested in him. He also claims substantial sums for the loss of the use and occupation of the lands and for alleged damage to buildings and fences.

The notice of motion really attacks the statement of claim on two grounds (*a*) that it does not on the face of it disclose a reasonable cause of action, and (*b*) that the cause of action which it seeks to put forward is vexatious and an abuse of the process of the court. If the court is satisfied that the statement of claim can be successfully attacked it is a matter of importance upon which of these two grounds the attack can be successfully sustained. If the court is satisfied that the action is vexatious or an abuse of its process it will order it to be summarily stayed or dismissed. If on the other hand the court is not satisfied that the action is vexatious or an abuse of its process but comes to the conclusion that the statement of claim as it stands is defective as not disclosing a cause of action, it will only put a stop to the action if it can see that the case sought to be made is so hopeless that the statement of claim cannot be cured by any reasonable amendment. If it sees that the plaintiff in the statement of claim is putting forward what may be a good cause of action but that that cause of action is defectively expressed, e.g. through the omission of some essential averment, then it will ordinarily not put a summary end to the action but will give the plaintiff an opportunity to amend his pleading and will only stay the action pending such amendment.

On the hearing of the present motion the defendant concentrated his attack on the statement of claim on the ground that it was vexatious and an abuse of the process of the court. The whole of defendant's argument proceeded on this ground. No suggestion was made that the statement of claim was defective on its face as not setting out a good cause of action. I do not think it is unfair of me to say that it was not

questioned in the defendant's argument before me that if the plaintiff succeeded in establishing the allegations in the statement of claim and if there was no defence put in he would be entitled to have the transactions set aside. Of course if the defendant makes good his contention that the action should be dismissed as vexatious and an abuse of the process of the court, then no question arises as to whether the statement of claim sufficiently discloses, without amendment, a good cause of action. And it is obvious that the defendant's desire on the present motion is not simply to have a defective pleading struck out, but to have a summary end put to the action if he possibly can.

I shall accordingly first consider the motion from the point of view which the defendant presented viz. that the action should be stayed or dismissed as vexatious and an abuse of the process of the court.

The court has an undoubted inherent jurisdiction to strike out a pleading or dismiss an action which it can see is obviously frivolous or vexatious or an abuse of its process : *Reichel v. Magrath* (1) ; *Lawrance v. Norreys* (2). This however is a very strong course to take and the jurisdiction is one which will be exercised with the greatest care and circumspection. The theory of our law is that every subject has prima facie a right to have his action brought to trial : *Seaton v. Grant* (3) per Lord Cairns ; *Blair v. Crawford* (4) per Palles C.B. Accordingly the court is very slow to make a summary order to stay which will have the effect of stopping the plaintiff's case in limine and of preventing it from going to trial. It will however make such an order if it is manifest that the plaintiff's case cannot possibly succeed or if it is clear that the action is an abuse of the process of the court. In exercising this inherent jurisdiction the court is not confined to what appears on the face of the pleadings. Extrinsic evidence is admissible of the facts which it is contended should induce the court to act.

(1) (1889) 14 App. Cas. 665.
(2) (1890) 15 App. Cas. 210.
(3) (1867) L.R. 2 Ch. 459, 464.
(4) [1906] 1 I.R. 578, 586.

The facts on which the defendant asks the Court to act on the present application are set out in his affidavit of March 1, 1952, and in an earlier affidavit therein referred to made by him on April 26, 1950, in previous proceedings brought against him by the plaintiff.

The defendant in his affidavits deposes that the two parcels of land referred to in the plaintiff's statement of claim were purchased by the defendant from Francis Mulgrew senior, the plaintiff's father, in September, 1947, for £500, that this £500 was duly paid, and that the lands were conveyed to the defendant. In January, 1948, Francis Mulgrew senior brought proceedings on the equity side of the county court alleging that the lands were conveyed to the defendant as security for an advance of £500 on or about August 23, 1947, upon the terms that the defendant should occupy the lands in lieu of interest and that the repayment of the £500 would not be sought for a period of five years. Francis Mulgrew senior accordingly claimed an order that the conveyances should be amended to provide for a right of repayment of the £500 within five years from August 23, 1947. The case came on for hearing before the county court judge on May 7, 1948. It was part heard but before it was fully heard an agreement was entered into between the parties that the suit be dismissed, each side to bear their own costs, the defendant to be entitled to that season's crop, the plaintiff to have the grazing of one cow for the season 1948, on such part of the lands as pointed out to him by the defendant, and that if between November 1, 1948, and December 31, 1948, the plaintiff (Francis Mulgrew senior) paid the defendant the sum of £500 the defendant would transfer and convey the lands to the plaintiff or his nominee. The defendant avers that he was never paid this £500 or any part thereof. He exhibits letters from solicitors on behalf of Francis Mulgrew senior alleging that he paid the defendant this £500 on the January 1, 1949. This allegation the defendant says is absolutely false. Certainly no proceedings were ever instituted against him either

for specific performance of the agreement of May 7, 1948, or for recovery of the £500 and, so far as I can gather the present plaintiff's attitude in the present action, I doubt if he is minded to persist in this allegation of the payment of the £500 by Francis Mulgrew senior. The defendant further deposes that from June, 1948, onwards Francis Mulgrew senior and his son, the present plaintiff, repeatedly trespassed upon the lands and committed numerous acts of waste and vandalism. The defendant instituted proceedings in the county court against both father and son claiming damages and an injunction. The county court judge, on April 26, 1949, held in favour of the present defendant and awarded him damages against both the Mulgrews and granted an injunction against the son. The Mulgrews appealed to the judge of assize who, on July 19, 1949, affirmed the county court judge's decree and extended the injunction to include the father as well as the son. The defendant had allowed Francis Mulgrew senior to occupy a house on the lands free of rent and taxes for the period of his life. Francis Mulgrew senior died on October 19, 1949. His son, the present plaintiff, refused to vacate the house. The defendant accordingly instituted ejectment proceedings in the county court and an order for immediate possession was made in his favour by the county court judge on February 7, 1950. The present plaintiff then appealed to the judge of assize who, however, affirmed the ejectment decree with costs on March 15, 1950. The present plaintiff's next step was to issue a specially indorsed writ against the defendant on March 21, 1950 claiming £371 : 16 : 6 " for possession of deeds " and apparently alleging again that the 1947 transaction was intended to be a mortgage. The indorsement of the writ contained other allegations which are to my mind really unintelligible. On a motion by the defendant it was held on May 12, 1950, by Sir James Andrews L.C.J.: (1) that the statement of claim indorsed on the writ of summons sought to raise anew matters already decided between the parties by a court or courts of competent jurisdiction; (2) that it was unintelligible, frivolous

and vexatious and (3) that it disclosed no cause of action. It was accordingly ordered that the statement of claim be struck out and that the action be dismissed and that judgment be entered for the defendant with costs. The plaintiff appealed against this order and on November 2, 1950, the Court of Appeal dismissed the appeal with costs. The defendant states in his affidavit that the plaintiff then served him with a notice of appeal to the House of Lords but never pursued this appeal or took any further steps therein. The defendant further deposes that he has never succeeded in recovering any of the costs awarded to him in the trespass proceedings in 1949, the ejectment proceedings in 1950 or the High Court proceedings later in that year. He also avers that he has a good and valid defence to all the matters set out in the statement of claim in the present action and says that all the matters set out therein are without any substance or truth whatever. The plaintiff has not filed any affidavit in the present action for the purpose of controverting the allegations in these affidavits of the defendant. On the hearing of the motion, however, he handed in a copy of an affidavit made by Dr. Hugh Finnegan of Ballygawley on May 10, 1950, in the previous High Court proceedings and filed by the present plaintiff on May 11, 1950. In that affidavit Dr. Finnegan deposed that in his capacity as a medical doctor he attended Francis Mulgrew senior for nine years, that during the month of August, 1947 he was in attendance on him once, that his general condition then suggested to Dr. Finnegan that he had got a stroke which affected his hearing, speaking and eyesight and that in the doctor's opinion he was not capable of understanding or signing documents. Dr. Finnegan, however, says that at the time he did not examine the patient specifically for testamentary capacity as he did not think it necessary

The crucial allegations in the plaintiff's statement of claim in the present action are, in paragraph 3, that at the time of the alleged execution of the documents of September, 1947, Francis Mulgrew senior was not capable of understanding or signing any docu-

ments, and, in paragraph 7, that from September, 1947, until his death on October 10, 1949, he did not understand nor was he capable of understanding that a conveyance and transfer of the lands had been executed in favour of the defendant. In view of what Dr. Finnegan deposes about the condition of Francis Mulgrew senior in August, 1947, it would be quite impossible to rule on a summary application such as the present one that these allegations are unfounded though apparently the old man was sufficiently competent to make a will in favour of the present plaintiff on September 3, 1949.

This however is not to say that there may not be perfectly sound grounds on which the court may order the statement of claim to be struck out or the action stayed or dismissed in the present case. It is accordingly necessary to examine the various grounds on which the defendant contends that the case is one in which the court ought to order the action to be stayed or dismissed, remembering always, as was said by Lord Halsbury in *Higgins v. Woodhall* (1), that the court must not prevent a suitor from exercising his undoubted rights, i.e., to have his action tried, on any vague or indefinite principles.

The principal grounds upon which the defendant founds his application are: (a) that the questions sought to be litigated in the present action have already been disposed of in the equity proceedings in the county court, the trespass proceedings and the ejectment proceedings, and the previous High Court proceedings in 1950, and (b) that the defendant has not been paid a single penny of all the costs which the plaintiff has been ordered to pay to him in the various earlier proceedings.

As regards the first of these grounds it is clear that the plaintiff's real claim in the present action is to have the transaction of September, 1947 set aside on the ground that his father Francis Mulgrew senior was not then capable of understanding or entering into such a transaction. This, however, was not the

(1) (1889) 6 T.L.R. 1.

claim formulated in the proceedings on the equity side of the county court in 1948. The claim then was not that Francis Mulgrew senior was incapable of entering into the transaction but that the transaction was not (as would appear on the face of the documents) a sale by Francis Mulgrew senior to the defendant but was on the contrary a conveyance by way of security for a debt of £500. What was in issue in the equity civil bill proceedings was merely the nature of the transaction, not the competence of Francis Mulgrew senior to enter into it. Accordingly I do not think that the issue raised in the present action can be regarded as identical with the issue raised in the equity civil bill proceedings.

The claims, however, in both proceedings arise out of the same transaction, and it is urged that where a party, knowing all the relevant circumstances, institutes an action in regard to a transaction which he has entered into, he ought not to be permitted to keep back portion of his case and bring it forward in a fresh action after the first has been disposed of. Strong support for this contention is to be found in the judgment of Wigram V.-C. in *Henderson v. Henderson* (1), where he says: "I believe I state the "rule of the Court correctly when I say that where a "given matter becomes the subject of litigation in "and of adjudication by a Court of competent juris- "diction, the Court requires the parties to that "litigation to bring forward their whole case, and will "not (except under special circumstances) permit "the same parties to open the same subject of litiga- "tion in respect of matter which might have been "brought forward as part of the subject in contest, "but which was not brought forward, only because "they have from negligence, inadvertence, or even "accident, omitted part of their case. The plea of "*res judicata* applies, except in special cases, not only "to points upon which the Court was actually required "by the parties to form an opinion and pronounce a "judgment, but to every point which properly belonged

(1) (1843) 3 Ha. 100, 114.

" to the subject of litigation, and which the parties, " exercising reasonable diligence, might have brought " forward at the time ".

Although this judgment has frequently been cited with approval in subsequent cases I do not think that I could safely rely upon it as entitling me to order the present action to be dismissed or stayed. In *Hunter v. Stewart* (1), a plaintiff whose suit had been dismissed in a colonial court instituted a new suit in the English courts in regard to the same subject matter and based upon rights which the plaintiff possessed and knew he possessed at the time of the original proceedings, but stating different grounds of claim giving rise to a different equity. Relying on the statement of the law in Wigram V.-C.'s judgment in *Henderson v. Henderson* (2), Page Wood V.-C. held that the plaintiff's suit ought not to be entertained by the court. On appeal, however, this decision was reversed by Lord Westbury C. who held that the dismissal of a former bill ought not to be treated as a bar to a new suit seeking the same relief but stating a different case, giving rise to a different equity. In the subsequent case of *Simpson v. Fogo* (3), Page Wood V.-C. refers to Lord Westbury's judgment and recognizes that he is bound by it as a decision of an appellate court. He says: " The Lord Chancellor was of opinion that, the " foundation of the claim being new, although relating " to the same subject matter, and based on rights " which the Plaintiff possessed and knew he possessed " at the time he instituted the original proceedings, " he might file a new bill founded on that equity of " which he did not avail himself in the former suit ". And later he summarizes the position by saying: " The Lord Chancellor's judgment has determined " that a Plaintiff may subsequently upon different " equities file two or three bills for the same subject " matter ". In the present action, as I have already

(1) (1861) 4 De G. F. & J. 168.
(2) (1843) 3 Ha. 100, 114.
(3) (1863) 1 H. & M. 195, 226, 228.

stated, the plaintiff seeks to rely on an entirely different equity from that upon which the claim in the equity civil bill of January, 1948, was based. In view of the decisions in *Hunter v. Stewart* (1), and of the decision of the House of Lords in the subsequent case of *Stewart v. Kennedy* (2), to which I shall refer later, I do not think that I would be justified in summarily disposing of the plaintiff's present claim on the ground that he ought not to be allowed to litigate it now after Francis Mulgrew senior had failed to raise it in the equity civil bill proceedings of 1948.

I turn next to the trespass proceedings in 1949 and the ejectment proceedings in 1950. So far as appears from the affidavits the plaintiff's present claim was not raised as a defence to either of those proceedings. No doubt section 96 of the Civil Bill Act, 1851, provides that every defendant in every civil bill shall be entitled on the hearing of such civil bill to every defence which he may have at law or in equity. But I do not think that this section would have entitled the present plaintiff, or his father, to raise as a defence to either the 1949 or 1950 proceedings the claim which he puts forward in the present action. It was well established that the similarly worded sections in the Common Law Procedure Acts only allowed defendants to raise equitable defences where the decrees which a court of equity would pronounce in their favour would be simple and final and not clogged with conditions or preliminaries: *Wodehouse v. Farebrother*(3); *Colles v. Prendergast* (4). In the present case a decree of a court of equity in favour of the present plaintiff would not be simple or unconditional. It would be subject to and conditional upon the repayment by him of the £500 and interest, less, of course, an amount by way of occupation rent and compensation for any damage to the property, and the decree would have to direct the taking of an account and the execution of a conveyance: see

(1) (1861) 4 De G. F. & J. 168.
(2) (1890) 15 App. Cas. 108.
(3) (1855) 5 El. & B. 277.
(4) (1860) 10 I.C.L.R. 336.

Wilkinson v. Fowkes (1) per Turner V. C.; *Clark v. Malpas* (2). Accordingly I do not think that section 96 of the Civil Bill Act (even if it is to be read as making it compulsory for a defendant to raise his equitable defences, which I doubt) could be read as including among the defences which could be raised in civil bill proceedings such an equitable claim as that put forward in the present action. I am therefore of opinion that the decisions in the trespass case and the ejectment cannot be regarded as constituting a bar to the plaintiff putting forward his present claim.

As regards the action instituted by the plaintiff in 1950 it appears from the order made by Sir James Andrews L.C.J. (which was subsequently affirmed by the Court of Appeal) that the grounds on which the claim in that action was ordered to be struck out and the action dismissed were (1) that the claim indorsed on the writ sought to raise anew matters already decided between the parties by a court or courts of competent jurisdiction (2) that it was unintelligible, frivolous and vexatious and (3) that it disclosed no cause of action. It was difficult to extract any intelligible meaning from the somewhat lengthy claim indorsed on that writ. It certainly seemed to seek to raise anew the claim made in the equity civil bill proceedings. Quite possibly it intended also to raise the claim which is put forward in the statement of claim in the present action. I infer this mainly from the fact of the filing of Dr. Finnegan's affidavit: it is hard to see how that affidavit could have any relevancy except in regard to such a claim. Inasmuch, however, as the issue raised in the present action had not, so far as appears, been raised in any proceedings prior to the 1950 action the Lord Chief Justice and the Court of Appeal cannot be regarded as having dealt with that issue in ruling that the claim indorsed on the writ sought to raise anew matters already decided between the parties. If the present claim was intended to be included in the indorsement it must have been

(1) (1851) 9 Ha. 592, 594-5. (2) (1862) 4 De G. F. & J 401.

in that part which was struck out as unintelligible and therefore frivolous and vexatious. I cannot think that an order striking out a claim as unintelligible and dismissing an action accordingly could be regarded as constituting a bar to a subsequent action putting forward an intelligible claim.

In the result it appears to me that it cannot be said that the question sought to be raised by the statement of claim in the present action has arisen for decision in any of the previous proceedings between either Francis Mulgrew senior or the present plaintiff and the defendant.

There is, however, a somewhat different ground upon which the defendant may have an answer to the plaintiff's present claim. Even if the truth is assumed of what is complained of in the statement of claim the position would be that the transactions of September 1947, and the conveyance and transfer then executed by Francis Mulgrew senior were not absolutely void but were at worst merely voidable by Francis Mulgrew senior or by the plaintiff as his personal representative. In the case of a voidable transaction of this nature the party who alleges that he was defrauded or misled may take one of two courses. On the one hand he may repudiate the transaction and claim to have it rescinded. If he elects to take this course he can take proceedings under the equitable jurisdiction of the court to have the transaction set aside. On the other hand he may elect to accept and affirm the transaction. When the party entitled to repudiate such a transaction, being aware of the position and his rights, has once elected to affirm it he cannot subsequently claim to rescind it and the court in exercising its equitable jurisdiction will refuse to set it aside at his suit. Election to affirm a transaction may not only be expressly declared but may be shown by the acts of the party concerned. A good instance of the court refusing to set aside a voidable transaction which the conduct of the plaintiff showed that he had elected to affirm is *Jarratt v. Aldam* (1). In that case the

(1) (1870) L.R. 9 Eq. 463.

plaintiff sought to have a settlement declared not to be binding upon him on the ground that he had executed it in ignorance of its true intent and purpose. The court, however, refused him relief and dismissed his claim on the ground that he had subsequently exercised a power of jointuring contained in the settlement at a time when he had become perfectly well aware of its nature.

In the present case it is suggested that when Francis Mulgrew senior brought the equity civil bill in 1948 claiming to have the conveyance of September, 1947 amended to provide for a right of redemption in accordance with what he then alleged to have been the terms of the transactions entered into by him with the defendant he must be taken to have elected to accept the position that he was competent at the time of those conveyances to enter into and understand business transactions. And it is said that after Francis Mulgrew senior had made the case set up in the equity civil bill neither he, nor the present plaintiff, ought to be allowed to turn round and allege in subsequent proceedings that in September, 1947, Francis Mulgrew senior was not capable of understanding any transaction or document at all. I do not think, however, that in view of the authorities this contention can be sustained. In the Scottish case of *Stewart v. Kennedy* (1), the appellant had contracted to sell certain estates to the respondent. A dispute arose between the parties in regard to the true meaning and effect of the contract. This was litigated in the courts and a decision was given in favour of the respondent's contention. The appellant then instituted proceedings to have the contract set aside and proposed several issues for trial before a jury. The first of these issues was whether at the date of the contract the appellant was weak and facile of mind and easily imposed upon and whether the respondent's agent, taking advantage of this weakness and facility, procured the contract by fraud and circumvention. The Lord Ordinary (Lord Kinnear) allowed this issue

(1) (1889) 16 R. 857 : (1890) 15 App. Cas. 108.

but refused to allow the other issues which the appellant proposed. The appellant appealed to the Court of Session which affirmed the decision of the Lord Ordinary and the Lord President (Lord Inglis) in his judgment expressly approved the granting of this first issue. The appellant then carried an appeal to the House of Lords. On this appeal the allowance of this first issue was not contested and the appellant succeeded on the appeal to the extent that the House of Lords allowed him a further issue as to whether the appellant was at the time of the contract under essential error as to its import and effect induced by the respondent's agent. This case appears to establish that the mere fact that a party has unsuccessfully litigated the nature and effect of a transaction which he has entered into does not debar him from subsequently taking proceedings to have the transaction set aside on such grounds as those alleged in the statement of claim in the present case. *Stewart v. Kennedy* (1) is no doubt a Scottish case, but the decision allowing the issues has been recognised as applicable in English as well as in Scottish Law. In *Wilding v. Sanderson* (2), Chitty L.J. is reported as saying: "A comparison "of the two cases of *Stewart v. Kennedy* (3) shows "that after failing in an attempt to obtain a decision "on a point of construction, it is competent for a man "to institute an action to have the contract set "aside".

A much stronger argument in support of the contention that Francis Mulgrew senior had elected to abandon any right which he might have to have the transaction of September, 1947, rescinded might perhaps be afforded by the fact of his having entered into the agreement settling the equity civil bill proceedings. I think it could be quite reasonably contended that the terms of the settlement were inconsistent with the reservation by Francis Mulgrew senior of any right which he may have had to have the whole September, 1947, transaction set aside *ab initio*. If however

(1) (1890) 15 App. Cas. 108
(2) [1897] 2 Ch. 534, 553.
(3) (1890) 15 App. Cas. 75, 108.

Francis Mulgrew senior ever had an equitable right to have that transaction set aside on the ground that he was mentally incapable of entering into it or understanding it he could not be held to have elected to abandon this right unless he had full knowledge of the facts giving rise to the right and full knowledge of the equitable rights arising out of those facts: *Moxon v. Payne* (1); *Kempson v. Ashbee* (2). If in answer to the plaintiff's claim the defendant sought to establish that Francis Mulgrew senior had by entering into the compromise of the equity civil bill proceedings elected to abandon any rights which he might have had to have the original transaction set aside the questions of Francis Mulgrew senior's knowledge on May 7, 1948, of the facts of the original transaction and of the equitable rights arising out of those facts would be questions of fact and of evidence even although Francis Mulgrew senior had legal advice at the time of the compromise. Such questions are obviously questions appropriate to be tried out in an action and not questions to be disposed of summarily against a plaintiff on a motion such as the present one.

In the result therefore I am of opinion that I would not be justified in staying or dismissing the present action on the ground that the issue sought to be raised in it has already been decided in previous litigation between the parties.

Before leaving this aspect of the case I should perhaps mention the cases of *Grepe v. Loam* (3) and *Kinnaird v. Field* (4) which were so much relied on in the argument on behalf of the defendant. In each of those cases the circumstances were that one of the parties had been abusing the process of the court by making a whole series of unfounded and frivolous interlocutory applications in an action and an order was made precluding the offending party from making any further interlocutory applications without first obtaining leave from the court. These cases are obviously far removed from a case in which the object

(1) (1873) L.R. 8 Ch. 881.
(2) (1874) L.R. 10 Ch. 15.
(3) (1887) 37 Ch.D. 168.
(4) [1905] 2 Ch. 306.

of the application is to strike out the plaintiff's claim in an action altogether and to have the action summarily dismissed without allowing it to proceed to a hearing.

The second ground on which the defendant claims to have the action stayed or dismissed is that the plaintiff has failed to pay any of the costs which he has been ordered to pay in the previous proceedings between the parties.

It is impossible not to sympathise with the defendant who must by now have accumulated a very substantial claim for unpaid costs against the plaintiff. But I was not referred to any authority which, so far as I can see, would justify me in staying the present action on this ground. No doubt where a plaintiff, after failing in one action, commences a second action for substantially the same matter the court will stay the second action until the costs of the first action have been paid : *M'Cabe v. Bank of Ireland* (1) ; *Martin v. Beauchamp* (2). But the authorities appear to show that this rule does not apply and the second action will not be ordered to be stayed pending payment of the costs of the first where the objects of the two actions are not substantially the same even although both actions arise out of the same transaction : *Budge v. Budge* (3) ; *Hankin v. Turner* (4) ; *Higgins v. Woodhall* (5) ; *Abdy v. Abdy* (6). As I have already shown the object of the present action is quite different from that of the previous proceedings brought against the defendant and accordingly on the authorities it does not appear that I would be justified in ordering a stay of the present action until the costs of the previous proceedings have been paid.

As an alternative it was suggested that I ought to order the plaintiff to give security for the costs of the present action and stay the action until such security is given. No authority however was cited in support of this suggestion. A plaintiff resident within the jurisdiction will not be ordered to give security for

(1) (1889) 14 App. Cas. 413.
(2) (1883) 25 Ch.D. 12.
(3) (1849) 12 Beav. 385.
(4) (1878) 27 W.R. 232.
(5) (1889) 6 T.L.R. 1.
(6) (1896) 12 T.L.R. 524.

costs merely because of his poverty or even of his insolvency: the question of a stay pending the giving of security for costs should naturally appear to be subject to the same considerations and should, one would think, be ruled upon on the same lines as ordering a stay pending the payment of costs of previous proceedings: and it has been decided that on an application to stay proceedings as frivolous and vexatious and an abuse of the process of the court there is no jurisdiction to impose conditions (e.g. as to lodgment of money in court or as to giving security for costs) upon the court's assent to or refusal of the application: *Mittens v. Foreman* (1); *Bright v. Killey* (2).

So far I have dealt with the contention which was really argued before me, namely that this action should be stayed or dismissed as an abuse of the process of the court. I come now to the other contention raised in the notice of motion, namely, that the statement of claim discloses no cause of action.

The crucial allegations contained in the statement of claim as I have already said are, (a) the allegation in paragraph 3 that at the time of the execution of the conveyance of September, 1947, Francis Mulgrew senior was not capable of understanding or signing any documents, and (b) the allegation in paragraph 7 that Francis Mulgrew senior did not (*sc* understand) nor was he capable of understanding that a conveyance and transfer of the lands had been executed in favour of the defendant.

Now it is well established by the modern authorities and it is laid down in the modern text books that the law with regard to transactions entered into for valuable considerations by a person mentally incapacitated is that such a transaction is voidable if the other party to the transaction was aware of the incapacity but that it is valid if the other party dealing in good faith had no knowledge of or reason to suspect the incapacity: Dart, Vendor and Purchaser, 7th Ed., Vol. I, p. 7; Williams, Vendor and Purchaser, 4th

(1) (1880) 58 L.J. Q.B. 40 (2) (1900) 16 T.L.R. 559.

Ed., Vol. II, pp. 863-4 ; *Imperial Loan Co. v. Stone* (1) ; *York Glass Co. v. Jubb* (2) ; *Manches v. Trimborn* (3). And persons claiming through or under a person mentally incapacitated stand in no better position than the incapacitated person whose act they seek to avoid but are entitled to avoid what such person might have avoided (Hailsham, Vol. XXI, p. 281, and the cases there cited). Accordingly where a person seeks to have a transaction declared invalid and set aside on the ground of the mental incapacity of the person under whom he claims, it is not enough for him merely to allege the mental incapacity of that person. Knowledge of that incapacity on the part of the other party to the transaction—or possibly that he should have had such knowledge or that he had reason to suspect the incapacity—must be established if the transaction is to be set aside. A statement of claim merely alleging the mental incapacity of the person through whom the plaintiff claims but making no allegation that the other party to the transaction had knowledge, or should have had knowledge, of that incapacity or that he had some reason to suspect it, does not disclose facts sufficient to constitute a cause of action which would entitle the plaintiff to relief. In the present case there is no allegation in the statement of claim that the defendant was aware of, or that he should have been aware of, or that he had reason to suspect Francis Mulgrew senior's alleged incapacity. So that even if the plaintiff proved all that he alleges in the present statement of claim he would not have proved sufficient to entitle him to have the transactions of September, 1947, declared invalid or set aside. The statement of claim is therefore defective and as it stands it does not disclose a cause of action. The case bears a resemblance to *Griffiths v. London and St. Katharine's Docks Company* (4), in which a statement of claim was held defective by the English Court of Appeal and was set aside by reason of the absence from it of an allegation of want of knowledge on the part of the plaintiff, the court

(1) [1892] 1 Q.B. 599.
(2) (1925) 42 T.L.R. 1.
(3) (1946) 115 L.J. K.B. 305.
(4) (1884) 13 Q.B.D. 259.

holding that in that case want of knowledge on the part of the plaintiff was a necessary circumstance in order to constitute a good cause of action.

The precise point arose for consideration in the much more recent case of *Broughton v. Snook* (1), in which Farwell J. says (2): "By an amendment to the "defence, it is pleaded that the defendants deny that "any contract for the sale of the inn was entered into "as alleged, or at all, and they say that Mr. Snook by "reason of his health was incapable of transacting "business or of entering into any such contract as "alleged. That plea, if it is intended to be a plea "that the verbal contract could not be binding upon "Mr. Snook by reason of the fact that, at the date "when it was made, his mental condition was such as "to render him incapable of transacting business, is "a plea which is clearly demurrable. Such a plea "is not one upon which reliance can be placed, because "to entitle the defendants to rely upon such a plea "they should plead, as well as prove, that the condition "of the other party was known to the plaintiff, or "should have been known to him. If authority for "that proposition is wanted, it is to be found in "*Imperial Loan Co. v. Stone* (3). If the plea was "intended to be a plea that, at the date of the contract, "Mr. Snook was incapable of transacting business "at all, then, in order to make it a defence upon which "reliance can be placed, it must be shown to be known "to both parties. There is no such plea here at all, "and, in my judgment, so far as that part of the defence "is concerned, it is not a plea on which the defendants "are entitled to rely. No evidence as to the mental "condition of Mr. Snook at that time is admissible, "because it is irrelevant."

The statement of claim in the present action must therefore be set aside on the ground that the facts alleged in it are insufficient to entitle the plaintiff to sustain an action. It would not, however, be proper or in accordance with the authorities to put an end

(1) 1938 1 All E.R. 411. (3) 1892 1 Q.B. 599.
(2) Ibid., 417.

summarily to the plaintiff's action on this ground. I shall accordingly not order the action to be dismissed but I shall give the plaintiff leave to serve an amended statement of claim if he is so advised.

The order which I shall make will be that the defendant's application will be refused in so far as it seeks to have the plaintiff's action stayed or dismissed, or to have the statement of claim delivered on February 16, 1952, struck out on the ground that it is frivolous or vexatious or an abuse of the process of the court, or on the ground that it seeks to raise anew questions already decided between the parties by a court of competent jurisdiction. It will, however, direct that the statement of claim be set aside on the ground that the averments contained in it are not sufficient to disclose a cause of action, but it will give leave to the plaintiff to deliver an amended statement of claim. It will further direct that no order be made on the application that the plaintiff do give security for the defendant's costs of the action.

As the order setting aside the statement of claim is being made on grounds which were not argued before me, and as I am refusing the defendant's application in so far as it is based on the grounds which were relied upon in the argument, I think the fair and proper course is to leave each of the parties to bear his own costs of the application.

Order accordingly.

Solicitors for the defendant : *Hoy Son & Murphy.*

J.P.

In re BLACKWOOD, GRAHAM v. HAMPSON (1)

Will—Construction—Gift "absolutely in full trust and confidence" Direction to divide among a class "in accordance with my wishes." —Precatory trust.

The testatrix appointed her brother-in-law sole executor and left to him her entire estate subject to the payment of just debts and funeral and testamentary expenses "absolutely in full trust and confidence that he will pay, apply and divide my said estate amongst my friends and relatives (including himself) in accordance with my wishes". The testatrix did not make any communication of her wishes.

Held, that on the true construction of the will a trust was created since the words "in accordance with my wishes" implied a division which the testatrix could control by supplementary directions; but as the terms of the trust had not been declared the executor held on a resulting trust for the next-of-kin.

Decision of Curran J. affirmed.

Appeal from an order of Curran J.

By her will dated March 21, 1951, Agnes Elizabeth Blackwood appointed her brother-in-law, Thomas Frederick Hampson, to be the sole executor of her said will and subject to the payment of her just debts and funeral and testamentary expenses the testatrix devised and bequeathed and appointed all her real and personal estate as follows:—"unto my brother-in-law "the said Thomas Frederick Hampson absolutely in "full trust and confidence that he will pay, apply and "divide my said estate amongst my friends and "relatives (including himself) in accordance with my "wishes."

The testatrix died on March 28, 1951, and probate of her will was on July 31, 1951, granted to Thomas Frederick Hampson. On May 29, 1952, an originating summons was issued by David Graham, one of the next-of-kin of the testatrix, for an order for the

(1) In the Court of Appeal before Lord MacDermott L.C.J., Porter and Black L.JJ.; Nov. 11, 1952; Jan. 26, 27, March 31, 1953.

administration of the estate of the testatrix and for the determination of a number of questions arising on the construction of the will. The two principal questions raised on the summons were answered by Curran J. as follows:

> 3. Is the estate of the testatrix held in trust for the next-of-kin of the testatrix?—Yes.
>
> 5. Does the estate of the testatrix belong to the defendant beneficially?—No.

The defendant appealed.

Patton Q.C. and *Reid* for the appellant.

McVeigh Q.C. and *Craig* for the respondent.

Cur. adv. vult.

LORD MACDERMOTT L.C.J.: By her last will dated March 21, 1951, Miss Agnes E. Blackwood, who died on the 28th of the same month, appointed her brother-in-law, the defendant Thomas Frederick Hampson, her sole executor and then provided as follows: "Subject to payment of my just debts and funeral "and testamentary expenses, I give, devise, bequeath "and appoint all the real and personal estate of "which I may die possessed or over which I may have "any disposing or appointing power unto my brother-"in-law the said Thomas Frederick Hampson "absolutely in full trust and confidence that he will "pay apply and divide my said estate amongst my "friends and relatives (including himself) in accord-"ance with my wishes."

The principal question for determination is whether this disposition gives the residuary estate to the defendant beneficially or as a trustee. If the clause had ended with the word "absolutely" the matter would, of course, be beyond dispute. What has to be settled is whether the words that follow "absolutely" are merely precatory or are meant to impose a binding trust upon the defendant.

In the course of the argument numerous decisions

on dispositions showing various degrees of similarity with the language of this will were cited in support of both views. I do not propose to attempt any close survey of these authorities. To argue from the wording of one will to that of another is generally an unsatisfactory process and one that often involves an abuse of precedent. Resort to previous decisions in this field should aim at discovering the principles to be applied and, that done, the instant document must be construed in the light of those principles and according to the ordinary canons of construction. In *In re Hamilton* (1), the decision was against a trust, but the Court of Appeal laid down the broad rule to be followed in terms which, though couched in language appropriate to the decision, are of general applicability. In the course of his judgment Lindley L.J. puts it thus: "You must take the will which "you have to construe and see what it means, and if "you come to the conclusion that no trust was "intended, you say so, although previous judges have "said the contrary on some wills more or less similar "to the one which you have to construe." (2) And Kay L.J., having stated his conclusion, on looking at the will apart from authority, to be in favour of a beneficial gift, added this regarding the submission that a trust had been created: "But then it is said "we are bound to put this construction upon the "gifts because of the current of authority. To hold "that I am bound to read this will in the way in which "it is argued it should be read because of the current "of authority, would be to tell me I am bound to "defeat the intention of this particular testatrix "because in somewhat similar cases the Court has "come to a different conclusion. That is not the way "to use authorities on the construction of a will; "and where I find nothing in the will which will "warrant me in coming to that conclusion, I decline "to admit that there is any rule of construction which "obliges me to treat a will in such a way as to defeat "the intention of the testator." (3).

(1) 1895 2 Ch. 370. (2) Ibid. 373. (3) Ibid. 376.

The propriety of this method of approach is beyond doubt and the function of the court is therefore to ascertain the intention of the testatrix as manifested by the language she has used.

I cannot regard either "absolutely" or "in full "trust and confidence" as conclusive on this question. "Absolutely" may connote a complete legal interest without a complete beneficial interest, and "in full "trust and confidence" is a phrase which may aptly preface what is precatory as well as what is imperative. In my opinion, these expressions must take their meaning in this will from the true import of what follows, namely, "that he will pay apply and divide "my said estate amongst my friends and relatives "(including himself) in accordance with my wishes." It seems to me that the key to this passage, and indeed to the whole inquiry, lies in the last five words. Had they had been omitted I should be inclined to regard all that comes after "absolutely" as precatory and incapable of binding the defendant. But if "in "accordance with my wishes" refers to wishes expressed or made known then it appears to me reasonably plain that what the testatrix intended was not a division of her estate according to the defendant's notions, but a division which she meant to control by way of supplementary directions. And if that was her intention I think this will must be construed, not as declaring a pious hope, but as meant to impose a trust.

The question, then, is whether these words "in "accordance with my wishes" do refer, on their sound construction, to an expression of wishes by the testatrix outside her will. On this, the defendant's submission was that these words, instead of meaning that, meant "as I would have wished" or "in accord-"ance with what he (that is the defendant) thinks "would have been my wishes." If that submission were well founded it would carry the defendant a considerable distance as it would commit the distribu

tion so entirely to his discretion and determination as to leave little support for the idea of a binding trust.

But, far from easy as the question is, there are difficulties about this contention that seem to me to justify its rejection. In the first place, it suggests that the testatrix regarded the defendant as knowing her mind, not only as respects those who constituted the wide and indefinite class of beneficiaries – " my " friends and relatives (including himself) "– but also as respects the manner and amount of the distribution in accordance with the words " pay apply and divide," an expression of much latitude and apparently designed to permit of varying and discriminatory benefits. Now it often happens that a testator shows confidence in a particular person in terms which indicate a common understanding about the matter in hand. The reports, particularly the husband and wife cases, furnish many instances of this kind. But I think it is correct to say that such a comm.. understanding will be inferred most readily where the relationship of those concerned is close and the subject matter is sufficiently simple and definite in character to make an informal understanding about it a likely thing. Here, I can see nothing in the will or in the surrounding circumstances to favour an inference of this nature. To assume that this testatrix thought that the defendant knew her mind regarding the distribution and application of her entire estate amongst her relatives and friends appears to me to be going well beyond the probabilities of the situation and to amount to nothing more than the merest speculation.

My second reason for not acceding to the contention under discussion lies in the fact that it does not sit easily upon the wording of the will. While the phrase " in accordance with my wishes " can be read naturally and according to the ordinary use of language as relating to expressed wishes, it seems to require some straining before it can be taken as referring, not to the expressed wishes of the testatrix, but to what would have been her expressed wishes had she chosen to voice them. The words " in accordance with " point

more aptly to something definite and ascertainable than to something that must rest on surmise and remain a matter of opinion.

I do not see any half-way house between the construction thus advanced on behalf of the defendant and the alternative already mentioned, and I am therefore of opinion that the phrase "in accordance "with my wishes" refers to wishes expressed or to be expressed by the testatrix and connotes a trust. The nature of this trust must now be further examined, but before doing so I should add that I have not overlooked the argument that its vagueness and uncertainty must be taken account of before reaching a final conclusion as to the intentions of the testatrix. Were the rival interpretations more equally balanced such a consideration might well turn the scale. To my mind, however, the meaning I attribute to the testatrix is, having regard to the language she has used, preferable to a degree which makes it impossible to regard this argument as a decisive factor.

As the defendant in his affidavit states that the testatrix had "never at any time expressed to me this "deponent or so far as I am aware to any other person "any wishes relating to the payment, application or "division of her estate" I think the proper conclusion must be that in speaking of her wishes the deceased was referring to instructions which she contemplated communicating to the defendant after she had made her will. It is clear, however, that one cannot create an effectual *testamentary* trust in this fashion and I think the consequence of this must be that the defendant takes as a trustee, but on a trust that cannot be operated, and that he therefore holds on behalf of the next-of-kin. It may be that if the class specified namely, "my friends and relatives (including him-"self)" were sufficiently certain to be ascertainable a division in equal shares amongst the members of that class could be justified. I express no opinion on that as I am satisfied that the class here is described in

terms which are too vague and uncertain to constitute a valid trust.

For these reasons, I am of opinion that the conclusion reached by Curran J. was right and that the appeal should be dismissed. The plaintiff only initiated the present proceedings after all his efforts to induce the defendant to do so as executor had failed. In the circumstances, I think the order as to costs in the court below should stand and that the plaintiff's costs of this appeal should be taxed as between solicitor and client and paid out of the estate. I would make no order as to the defendant's costs of this appeal.

PORTER L.J. [after stating the facts continued]: We were referred to a number of cases in which the wills contained a devise or bequest followed by words of trust or confidence somewhat similar to the words in the present case.

In *Wilson v. Major* (1): the testator gave all his effects (except a copyhold estate) to his wife for her maintenance upon full trust and confidence in her justice and equity that at her decease she would make a proper distribution of what was left to his children. It was held by Grant M. R. that the widow took an absolute interest.

Wright v. Atkyns (2) was a case heard in the House of Lords on appeal from Lord Eldon. A testator had devised his estate to his wife A and her heirs for ever in the fullest confidence that after her decease she would devise the property to his family. The House of Lords without deciding on the meaning of the word "family" held that she took the property in fee simple. Such at all events is the substance of the decision in the opinion of Lindley L.J. in the case of *In re Williams: Williams v. Williams* (3), though Lord St. Leonards in his final comments on the case said: "The great question was left undecided, viz. "whether a trust was created and for whom. It was "treated as clear that the words were sufficient to

(1) (1805) 11 Ves. 205.
(2) (1823) Turn. & R. 143.
(3) [1897] 2 Ch. 12, 20.

" raise a trust if the objects were clearly ascertained." (1). Again in *Webb v. Wools* (2), where a testator gave all his property to his wife her executors administrators and assigns to and for her and their own use and benefit " upon the fullest trust and confidence reposed in her " that she will dispose of the same for the joint benefit " of herself and my children." Kindersley V.C., while of opinion that no trust was created, declined to make a positive declaration to that effect and decreed that the residue should be transferred and paid to the widow. So also in *In re Adams and Kensington Vestry* (3), a testator gave all his property to the absolute use of his wife her heirs executors administrators and assigns " in full confidence that she would do what was " right as to the disposal thereof between his children, " either in her lifetime or by will after her decease." The Court of Appeal, Baggallay, Cotton and Lindley L.JJ. (affirming the decision of Pearson J.) held that the widow took an absolute interest unfettered by any trust in favour of the children.

Counsel for the defendant relied very strongly on the decision in *In re Williams* (4) a case to which I have already referred. A testator gave his residuary estate " to his wife Lucy her heirs, executors, administrators " and assigns absolutely in the fullest confidence that " she will carry out my wishes in the following parti- " culars namely, that she pay the premium due and to " become due during her life in respect of a policy for " £1,000 on her own life " (which was her own property) " . . . and that she by her will leaves the " moneys to become due and payable under such " policy, and also the moneys to become payable at my " death in respect of a certain policy on my life for " £300 . . . . to my daughter Lucy, and in case she " survives my said wife, in trust for her sole and " separate use " and he appointed his said wife Lucy and Reverend Thomas Williams executors and trustees

(1) Sugden, Law of Property 388.
(2) (1852) 2 Sim. N.S. 267.
(3) (1884) 27 Ch.D. 394.
(4) 1897 2 Ch. 12.

of his will. The Court of Appeal (Lindley and A. L. Smith L.JJ. affirming the decision of Romer J., Rigby L.J. dissenting) held that the widow took the residuary estate absolutely, and unfettered by any condition or trust.

Reference was also made to *Comiskey v. Bowring-Hanbury* (1), where a testator gave all his property to his wife "absolutely in full confidence that she will "make such use of it as I should have made myself "and that at her death she will devise it to such one or "more of my nieces as she may think fit." These words were followed by a direction that in a certain event the property was to be divided equally among the surviving nieces. It was held there was an absolute gift of the property to the wife subject to an executory gift of same at her death to such of the nieces as should survive her so far as she should not dispose by will of the estate in favour of such surviving nieces or any one or more of them.

It is interesting to observe that Lord Lindley dissented, thus agreeing with Kekewich J., and Vaughan Williams and Stirling L.JJ. who had heard the case in the Court of Appeal, that the wife took as absolute owner free from any legal or equitable obligation and also free from any executory gift over. In that case it was admitted that the wife took an absolute beneficial interest and the only question was whether the alleged gift over was not repugnant to the previous absolute gift.

Counsel also referred to *Reid v. Atkinson* (2), where a testator left his property to his wife for her life with power to dispose of it all both real and personal as she might judge best and wisest, he relying with confidence on her discretion, and that she would make such a distribution or disposal of it as would thoroughly accord with his wishes on the subject with all of which she was perfectly acquainted. There was some evidence of the testator having communicated some wishes to his wife, but none as to what they were. It was held by Lord O'Hagan L.C. and Christian L.J. that

(1) [1905] A.C. 84. (2) (1871) 5 I.R. Eq. 373.

there was no precatory trust and that the wife took the property both real and personal absolutely.

Two years later a somewhat similar case *Creagh Murphy* (1) came before the Vice-Chancellor. A testatrix left all her property to her son, the defendant, "to be disposed of by him as to him might appear "just, having every confidence that he will act fairly "and in accordance with my wishes." The defendant admitted that in a conversation with the testatrix some years before the execution of the will she said that she would wish him to give £50 to each of her two granddaughters and also some money to her two daughters. The Vice-Chancellor held that the disposal of the property was left to the discretion of the son, and that no trust was created.

On the strength of these authorities Mr. Patton contended that the words "in full trust and confidence" are not imperative, but are merely descriptive of the motive which influenced the testatrix in making an absolute gift of the property to the defendant. He also referred to the well-known passage in Sugdens Law of Property, p. 375, cited by Lindley L.J. in *In re Williams: Williams v. Williams* (2): "The law as to "the operation of words of recommendation, con- "fidence, request, or the like, attached to an absolute "gift, has in late times varied from the earlier au- "thorities. In nearly every recent case, the gift has "been held to be uncontrolled by the request or "recommendation made, or confidence expressed. "This undoubtedly simplifies the law, and it is not an "unwholesome rule, that if a testator really means his "recommendation to be imperative, he should express "his intention in an mandatory form." Not only was the expression of trust and confidence ineffectual to create a trust but the class of the beneficiaries under the alleged trust, viz., "my friends and relatives" was too vague and indefinite to be ascertainable. Even, if "relatives" be confined to next-of-kin according

(1) (1873) 7 I.R. Eq. 182. (2) [1897] 2 Ch. 12, 21.

to the Statutes of Distributions, it would be impossible to determine who should be included in the class as "friends" of the testatrix.

The case for the defendant may therefore be summarized under three heads: (*a*) the absolute character of the gift; (*b*) the absence of imperative words; (*c*) the impossibility of ascertaining the objects of the alleged trust.

The word "absolutely" raises considerable difficulty. Does it refer only to the quantum of the estate which the defendant takes in the residuary personalty, that is to say, an absolute estate, or does it refer also to the character of the estate, that is, as suggested by Mr. Patton, an absolute beneficial interest in the residue unqualified and unfettered by any condition or trust? There is one important respect in which the cases cited for the defendant differ from the present case. The defendant was the brother-in-law of the testatrix and had his own fairly substantial business, which was that of a general merchant, so that he was in no way dependent upon her, whereas in each of the cases cited for the defendant the donee was either a wife or a child for whom the testator was bound to provide or the persons who were naturally the objects of the testator's bounty. This is a consideration which should be borne in mind in deciding whether on the true construction of the will the testatrix intended to confer an absolute beneficial interest upon the defendant.

The meaning of the word "absolutely" was discussed by the English Court of Appeal in the recent case of in *In re Rees: Williams v. Hopkins* (1). The testator had appointed two persons, one being his solicitor, to be his executors and trustees and devised and bequeathed his entire property (subject to the payment of his debts and funeral and testamentary expenses) to his trustees absolutely they well knowing his wishes concerning the same. He had told his trustees that he wished them to make certain payments and to retain the surplus for their own use. After the

(1) [1950] Ch. 204.

payments had been made a substantial sum remained in the hands of the surviving trustee—the solicitor. The Court of Appeal affirming Vaisey J. held that the gift was fiduciary and not a gift to the trustees upon a condition, and that the surplus passed as on an intestacy.

Discussing the meaning of "absolutely" Evershed M. R. cited a passage from the judgment of Sargant J. in *In re Foord* (1) where the word "absolutely" had been used in a non-technical will: "First, there is the "use of the word 'absolutely.' No doubt it might "especially if used by someone acquainted with legal "language, be construed as describing the extent of "the interest in the property given—namely, the fee "simple in freehold property and the absolute interest "in personal property. But I think in this extremely "untechnical will the testator must have used it to "mean 'out and out', and that it therefore carried "not merely the full legal interest but the beneficial "interest also." Evershed M.R. then proceeded (2):

"I think that in this context, and in this will, the "word 'absolutely' should be construed not as con-"ferring a beneficial interest but as defining the "extent of the interest in the property given, so as to "confer upon the trustees the property given to them—"and I borrow the language used by Cohen L.J. "during the argument—free of any fetter which would "prevent their carrying out his express wishes."

In re Rees (3) was a case in which the property was given absolutely to persons expressly named as trustees, but I have cited it because the meaning there given to the word is one which I am prepared to adopt in the present case. An absolute beneficial interest in the entire residue is quite opposed to the express wish of the testatrix that the defendant should take only a share with the other friends and relatives among whom the residue was to be divided. In my opinion this

(1) [1922] 2 Ch. 519, 522.
(2) [1950] Ch. at 208.
(3) [1950] Ch. 204.

consideration coupled with the words "pay, apply and "divide" is the most cogent reason for holding that the testatrix intended him to take the property as a trustee, otherwise it is difficult to see why she should have laid so much stress on the carrying out of her wishes or specifically mentioned him as one of the intended beneficiaries or expressed the manner in which she wished him to deal with her estate with such particularity.

One other matter remains. It was argued that inasmuch as the objects of the alleged trust -friends and relatives (including the defendant himself) are uncertain and unascertainable, there can be no trust. Vagueness in the objects may indeed furnish a reason for holding that no trust was intended, yet this may be countervailed by other considerations shewing that a trust was intended while at the same time the objects are not sufficiently certain and definite to render the trust valid and effectual, but even though the trust fails because the class of beneficiaries cannot be ascertained, it does not follow that the person who is named as the intended trustee takes a beneficial interest in the property. For the reasons above mentioned I think that a trust was intended, but as the class of beneficiaries is too vague and uncertain, there is therefore a resulting trust for the next-of-kin of the testatrix: *Briggs v. Penny* (1); *In re Chapman, Hales v. Att.-General* (2).

I agree that the judgment of Mr. Justice Curran should be affirmed.

BLACK L.J.: The question for decision on this appeal is whether on the one hand clause 3 of the will of the testatrix is to be construed as expressing an intention on her part to invest the appellant with complete control over all her property relying entirely on his honour to distribute it in accordance with her wishes but leaving him unfettered by any legal responsibility to do so or whether on the other hand it is to be construed as expressing an intention to impose upon him an

(1) (1851) 3 Mac. & G. 546. (2) [1922] 2 Ch. 479

obligation which the law would enforce, an obligation of the type commonly referred to as a precatory trust.

In Jarman on Wills it was stated in the 1st edition (at p. 344) and the passage is repeated in the recent 8th edition (at p. 874): "If a trust is intended to be created," this should be done in clear and explicit "terms, and if not, any request or exhortation which "the testator may choose to introduce, should be "accompanied by a declaration, that no trust or legal "obligation is intended to be imposed." This is sound if elementary advice. The author of a well known students' text book on the Law of Wills describes the use of phrases which it may be contended are sufficient to create precatory trusts as "merely "incitements to litigation." I find it difficult to imagine an instance to which this description could more fitly apply than the will which is before the court in the present case. It would have required only a very few words to make clear what the intention of the testatrix really was.

I think there is little doubt but that if the Court of Chancery in the early part of the nineteenth century had been called upon to construe a will worded like the one now before the court they would have had little hesitation in holding that the devisee and legatee was not entitled to claim to hold the estate for his own use and benefit but was intended by the testatrix to take it subject to an obligation to apply it in accordance with her wishes. But during the past hundred years or so the attitude of the courts towards precatory trusts has definitely changed. The courts will not now be astute to spell out trusts from expressions which might be regarded as merely expressing the testator's wishes or motives in making the gift to the person sought to be treated as a trustee. In *In re Atkinson* (1), Cozens Hardy M. R. goes so far as to say that the leaning of the courts is now not to construe words used in a will, not being words of a strict definite legal character, or words that are beyond all

(1) (1911) 80 L.J.Ch. 370.

doubt equivalent words in short as creating a trust. The task of the court according to the modern authorities is simply to read the testator's will and endeavour from its wording to ascertain his intention without being tied down to interpretations which have been placed by previous decisions upon similar but somewhat differently worded wills.

In the majority of the reported cases it will be found that the courts on reading the whole of the will have been able to find expressions in other parts of the will which may be used as a guide in construing the precatory words. The present will however is a very short one and unfortunately there does not appear to be any guidance to be had except from clause 3 itself.

By clause 3 the testatrix first gives, devises, bequeaths and appoints all the real and personal estate of which she may die possessed or over which she may have any disposing or appointing power unto her brother-in-law the appellant absolutely. She then follows this disposition with the words "in full trust "and confidence that he will pay, apply and divide my "said estate amongst my friends and relatives (in-"cluding himself) in accordance with my wishes." In his argument on behalf of the appellant Mr. Patton naturally laid great stress on the fact that the devise and bequest to the appellant is expressed to be made to him "absolutely." The word absolutely may of course have either of two possible meanings. It may mean absolutely in estate, defining the amount of the estate which the devisee and legatee is to take, or it may mean absolutely in enjoyment signifying that the devisee and legatee is to take the property unencumbered by any trust or obligation. I think the latter sense is the sense in which it would ordinarily be used by a layman while the former is a sense in which it would naturally be used by a lawyer. In *In re Atkinson* (1), both Cozens Hardy M. R. and Buckley L.J. relied strongly on the use of the word "absolutely" as indicating that the interest given to the legatee was intended to be unfettered and unlimited

(1) (1911) 80 L.J.Ch. 370.

and not subject in the hands of the legatee to any trust. And to the same effect is the judgment of James V.-C. in *Irvine v. Sullivan* (1). On the other hand in *Comiskey v. Bowring-Hanbury* (2), Lord Davey apparently regarded the word as merely indicating the amount of estate bequeathed and attached little importance to the contention that it indicated something more. And there are quite a number of cases in the books where precatory trusts have been held to be effectively raised upon property devised and bequeathed absolutely. Probably the true principle is that when considering whether a devisee or legatee is intended to take for his own benefit or to take subject to a precatory trust the use of the word absolutely in the devise or bequest is an indication carrying a certain amount of weight in favour of construing the gift as one intended to be unfettered in respect of condition or trust, and that it will probably carry greater weight in this direction if the will is drafted by a layman and not as in this case by a lawyer.

After the word absolutely come the words "in full "trust and confidence." If the testatrix had used the simple expression "in trust" the construction of the devise and bequest would not be open to doubt. The appellant contends, and I think contends rightly, that the words "in full trust and confidence" taken by themselves are not so clearly imperative as the simple words "in trust." I do not think that reported decisions in which expressions verbally similar to "in "full trust and confidence" were considered assist us very much. Mr. Patton sought to lay great weight upon the judgment of Kindersley V.-C. in *Webb v. Woods* (3). But that was a case of the type of which there is a multitude of examples to be found in the books where a testator had bequeathed his property to his wife, obviously not intending to bind her by the fetters of a legally enforceable trust but confiding in her good sense and sagacity to dispose of it for the

(1) (1869) L.R. 8 Eq. 673, 680.
(2) 1905 A.C. 84, 89-90.
(3) (1852) 2 Sim. N.S. 267.

benefit of their family in the future as in her judgment she might think best. As was said by O'Brien L.C.J. in *Clancarty v. Clancarty* (1) in reference to the will in that case: "The testator intended to set up after his "decease, not a trustee, but as it were a second self, "whom he desired to invest with no legal responsi- "bility, but upon whom he conferred absolute domin- "ion, in order that she might the more effectually, "with greater flexibility and adaptiveness, recognize "and give effect to those moral claims and methods "of promoting family interests which an uncertain "future might develop and suggest, and which he "himself, if he had lived, would have recognized and "adopted." As regards other cases in which similar wording has been considered by the courts the most important is perhaps the decision of the English Court of Appeal in *In re Williams* (2). But in that case the court found ample material in other parts of the will tending to negative the conception that a trust was intended to be created, while Lindley L.J. is reported as saying (3): "There is also abundant authority for "saying that, if property is left to a person in con- "fidence that he will dispose of it in a particular way "as to which there is no ambiguity, such words are "amply sufficient to impose an obligation." As for the other word used in the present will by the testatrix, the word "trust," it is to be remembered that this is a will drawn by a lawyer, and the word "trust" is a lawyer's word of art, prima facie bearing a clear and recognized meaning. The authority most in favour of the appellant is perhaps the decision of James V.-C. in *Irvine v. Sullivan* (4). The word "trusting" used in the will in that case is however hardly as strong as the words "in full trust and confidence" used in the present case. Words which are alleged from time to time to create precatory trusts vary of course very greatly in their strength and cogency. Words expressing "full trust and confidence" are in their

(1) (1892) 31 L.R. Ir. 530 578.
(2) (1897) 2 Ch. 12
(3) Ibid. 18
(4) (1869) L.R. 8 Eq. 673

natural meaning much more cogent than such words as "hope" "desire" or "recommend."

The full trust and confidence which the testatrix expresses is that the plaintiff will pay, apply and divide her estate among her friends and relatives (including himself) in accordance with her wishes. The inclusion of the plaintiff appears to indicate that by the word relatives the testatrix meant something wider than relations by blood. And I think the natural meaning of the word friends as used in the phrase is something different from relatives: I think she meant to include friends to whom she was not in any way related. The words which she used seem to indicate that she had some scheme or programme of distribution of her estate in mind under which the appellant was to be one, but only one, of the beneficiaries. The word "divide" suggests that she had not only in mind the persons who were to benefit, but also the share which each was to take. And the wording also appears to me to indicate that the testatrix herself had prescribed or was intending to prescribe the beneficiaries and their shares. It was not as though she were going to leave the selection or the division to the appellant's discretion. These considerations appear to me to tend in favour of the respondent's contention on the present appeal. It is much easier to understand a person leaving the distribution of her estate to some trusted friend without imposing any legal obligation on him if her desire is to entrust him with a discretion in the selection of or in the division among the beneficiaries than if she intends him simply to carry out some fixed programme of division.

I confess I have found the case far from an easy one especially in view of such decisions as *Irvine v. Sullivan* (1) and *In re Atkinson* (2) not to speak of the dictum of Clauson J. in *In re Green* (3) that the tendency of modern decisions in cases on the border line is to lean against construing expressions of a precatory nature.

(1) (1869) L.R. 8 Eq. 673.
(2) [1911] 80 L.J. Ch. 370
(3) 1935 W.N. 151.

as creating a trust. But I find myself returning to the impression which I formed in regard to the natural meaning and effect of the will when I first read it, namely that the testatrix did not intend to leave her property in such a way that the appellant could claim if he chose to have an absolute beneficial interest in the whole of her estate but that she intended to leave her estate to him charged with the responsibility of paying, applying and dividing it among certain beneficiaries selected or to be selected by her in shares either prescribed or to be prescribed. As we learn from the appellant's affidavit the testatrix died without having expressed to him or, so far as he is aware, to any other person any wishes relating to the payment, application and division of her estate.

Accordingly, though with a certain amount of hesitation in view of what has been said in some of the authorities, I agree that the order of Curran J. should be affirmed.

Appeal dismissed.

Solicitors for the appellant : *J. Murland & Co.*

Solicitors for the respondent : *M'Lean & Son.*

S.M.M.

RUSSELL v. THOMPSON (1).

Criminal law—Disorderly behaviour "Any place to which the public have or are permitted to have access" Admission to dance hall on payment—Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935 (25 & 26 Geo. 5, c. 13), s. 59.

Section 59 of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, provides penalties for riotous, disorderly and indecent behaviour "in any . . . . place to which the public have or are permitted to have access."

Held, that neither the fact that a charge is made for admission to a dance hall nor the fact that the right to refuse admission is reserved is sufficient of itself to constitute those who gain admission a limited class distinguishable from the general public so as to deprive the hall of the character of a "place to which the public have or are permitted to have access."

Per Black L.J. Where words and phrases used in an Act of Parliament are taken from earlier statutes dealing with similar subject matter and these words and phrases have received judicial interpretation the presumption is that Parliament intended them to bear the meaning which has been judicially attributed to them, and this presumption is equally applicable when statutes of the Parliament of Northern Ireland have used words palpably taken from statutes of the United Kingdom which have been interpreted by the English courts.

CASE STATED by the County Court Judge for the County of Tyrone.

The defendant and respondent was charged at Aughnacloy Petty Sessions on a summons which charged that he had been guilty of disorderly behaviour in a place to which the public were permitted to have access contrary to section 59 of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935. The offence was alleged to have been committed in the Picture House, Aughnacloy, while a dance was being held there by the local branch of the British Legion. No special invitations were issued for the dance, which was advertised publicly, and no tickets were sold in advance. Admission was gained by payment at the door, the charge being 7/6 for gentle-

(1) In the Court of Appeal before Lord MacDermott L.C.J., and Porter and Black L.JJ.; October 23, December 1, 1952.

men and 5 for ladies. Between 100 and 150 persons, including the respondent, attended the dance.

The resident magistrate, being satisfied that the respondent's behaviour was disorderly, held that on these facts the picture house was "a place to which "the public were permitted to have access" and he accordingly convicted the respondent.

The respondent appealed to Quarter Sessions. The county court judge allowed the appeal, but at the request of the complainant and appellant he stated this case for the opinion of the Supreme Court as to whether or not he was correct in law.

Lowry for the appellant. According to the ordinary meaning of the words "persons permitted to have "access" would include persons who are permitted to have access upon payment, and the court should not reject the natural interpretation of the words without good reason. This interpretation is supported by the authorities. *Glynn v. Simmonds* (1) shows that the reservation of the right of exclusion is not a ground of distinction, and in *Langrish v. Archer* (2) a railway carriage was held to be an "open and public place" for the purpose of the Vagrancy Acts. That case, as interpreted by *Walshe v. Taggart* (3), is an authority for the proposition that "access" refers to access in fact. See also *Airton v. Scott* (4) where an athletic ground to which admission was had on payment was held to be "an open place to which the public have "access" for the purpose of a byelaw. The interpretation for which I contend is the straightforward and reasonable one, and therefore it is not necessary to consider the question of ambiguity: see the observations of Porter L.J. in his dissenting judgment in *Walshe v. Taggart* (3). The consideration of the purpose of this section and the context of the words lends further support to my argument. Disorderly behaviour may readily occur in dance halls, football grounds and other places to which numbers of persons are admitted on payment, and there appears to be no

(1) [1952] 2 All E.R. 47.
(2) (1882) 10 Q.B.D. 44
(3) [1951] N.I. 1.
(4) (1905) 25 T.L.R. 250

other provision to protect the public from the consequences of such conduct.

McSparran for the respondent. Where a person pays for admission to premises he enters not as a member of the public but by virtue of a private contract with those in charge. In considering the cases regard must be had to the relevant statutes; for example, it might not be possible to say that this hall was not a place of public resort for the purpose of the statute under consideration in *Glynn v. Simmonds* (1). I submit that the proper construction of the phrase "permitted to have access" is that persons are allowed to enter the place without restriction, and that once there is a check on the persons entering those admitted cease to be there as members of the public; but I need only say that this is a reasonable construction, for this is a penal section. He referred to *Minns v. Moore* (2), *Ministry of Agriculture v. Turtle* (3) and *Tuck & Sons v. Priester* (4).

Cur. adv. vult.

LORD MACDERMOTT L.C.J.: The defendant and respondent in this appeal was convicted at Aughnacloy Petty Sessions on May 6, 1952, on a complaint that on February 1 of that year he had been "guilty of disorderly behaviour in a place to which the public are "permitted to have access, to wit, a dance hall, "contrary to section 59 of the Summary Jurisdiction "and Criminal Justice Act (Northern Ireland), 1935." The terms of this section are important. They read as follows:

"59. Any person guilty of any riotous, disorderly or indecent behaviour in any street, road, "highway, or other public place, or in any place to "which the public have or are permitted to have "access, or on any premises licensed for the sale of "intoxicating liquor, shall be liable on summary

(1) 1952 2 All E.R. 47.
(2) [1950] 1 K.B. 241, 250.
(3) 1946 N.I. 63, 79.
(4) (1887) 19 Q.B.D. 629.

" conviction for every such offence to a fine not " exceeding forty shillings or to imprisonment for " a term not exceeding one month.

" The last paragraph of section seventy-two of " the Towns Improvement (Ireland) Act, 1854, " shall cease to have effect."

The respondent appealed and the learned county court judge allowed the appeal and dismissed the complaint. The facts are simple and may be stated shortly. On January 31, 1952, a dance, organised by the local branch of the British Legion, was held in the Picture House, Aughnacloy. It was brought to notice by an advertisement in the local press; no tickets were sold and no special invitations were issued. Admission was not confined to members of the British Legion or any other particular class. Those who came were admitted on paying at the door; 7/6 for gentlemen and 5/- for ladies. Between 100 and 150 persons attended including the respondent. In the early hours of the following morning the respondent became abusive and was guilty of disorderly behaviour within the meaning of section 59.

The learned county court judge allowed the appeal on the ground that the place in which the respondent misbehaved himself was not a " place to which the " public . . . . are permitted to have access " within the meaning of those words as used in the section, and the point now submitted for the opinion of this court is whether he was correct in so holding.

There can be no doubt that those who attended this dance (*a*) were members of the public in the sense that the invitation to which they responded was addressed to all and sundry and not to any special class of persons or group of designated individuals, and (*b*) were permitted to have access to the premises in question. It was, however, contended that those permitted to attend did not constitute " the public " for the purposes of section 59. While they might be drawn from " the public " they were, it was said, something less than, or different from, " the public " in that they had to pay for admission and had no

right of entry (even if willing to pay) should the organisers object This last point is not mentioned in the case, but I shall assume in its favour that the organisers of this dance were entitled to exclude any whom they did not want to admit. Does, then, the charge for admission or the right to deny entry, or both of these factors taken in conjunction, mean that on the true construction of the section those who were permitted to enter were not "the public?" The issue thus raised is of some general importance inasmuch as it is one which might well present itself in relation to other widespread types of entertainment, such as cinema shows and theatrical performances.

It will be convenient if I confine my attention, in the first place, to the text of the enactment immediately in question. So doing, I see no reason why the permission to which it refers should mean gratuitous permission and nothing else. The section was aimed at more than the preservation of the peace in public places. Its object seems rather to be the suppression of disorderly conduct in places where it is most likely to occur and cause trouble. The danger may arise not only from the public nature of the place but from the fact that the public may be present; and it may arise without regard to the public, as such, at all, for the reference to licensed premises recognises an ancient connection between intoxicating liquor and disorderly conduct and is capable of application to a private party in a private room.

I do not think a construction which would cover instances of permission given in return for a moderate charge would conflict with the purpose of the section. I do not deal with the question whether an exorbitant charge for admission might not justify the conclusion that those who could afford it were too narrow a class to constitute "the public." That is not this case. It has not been suggested at any stage of these proceedings that the charges here were other than moderate or that any significance whatsoever attaches to their amount. The contention is that those who, in response

to a public invitation, have paid any sum in order to gain access are no longer "the public."

As already indicated, I am unable to see why the mere fact of payment should remove a case from the policy of the section; there appears to be no sound reason for assuming that members of the public are less likely to cause disorder whenever they are willing to pay something for what they want. Moreover, it cannot, in my opinion, be said that the common, natural meaning of the expression "the public" is restricted to signifying nothing more and nothing less than the ordinary run of humanity, taken as it comes and without special attribute or qualification of any kind. No doubt, the requirement of particular attributes or qualifications may reach a point when one can say that a process of discrimination has produced a class which is not "the public." But, according to everyday parlance, payment alone need not involve this result. There is nothing incongruous or exceptional about referring to 'buses, trains, museums and picture galleries, for example, as being accessible to the public despite a charge for admission; and the same might be said of many places of entertainment. The statute book reflects this usage. See, for instance, section 36 (6) of the Public Health Acts Amendment Act, 1890, by which "place of public "resort" is defined as meaning, inter alia, "a public "place of assembly for persons admitted thereto by "tickets or by payment"; and section 1 (4) of the Street Betting Act, 1906, by which "public place" is defined to include, in certain events, "every en-"closed place . . . . to which the public have a "restricted right of access, whether on payment or "otherwise."

What, then, of the right to deny entry which I have assumed the organisers of this dance to possess? The bare existence of such a right cannot, in my opinion, take the case out of the section if only because the reference to permission seems necessarily to contemplate the existence of a right to refuse access, at all events before permission is given. The position

might well be different if the right had been exercised to an appreciable extent, for in such case the basis of the selection and its results might affect the issue. Here, however, this consideration has nothing to work upon. There is no finding of anyone being turned away and the applicability of the section to those who were permitted to enter can hardly depend on the circumstance that such permission could have been refused instead of being granted.

The points I have mentioned gain no further weight by their conjunction and I am therefore of opinion that there is nothing in the section itself to substantiate the decision of the learned county court judge. As I have not discovered anything in the rest of the Act of 1935 to modify this view I accordingly proceed to consider whether the authorities which were cited in argument are for or against it.

The first of these was *Langrish v. Archer* (1). There, it was held by a Divisional Court, consisting of Lord Coleridge C.J. and Stephen J., that a railway carriage, while on its journey, is within the description of "an open and public place . . . . to which the public "have or are permitted to have access" contained in section 3 of the Vagrant Act Amendment Act, 1873. Both the learned judges refused to accede to the contention that, as access to the carriage in question was only upon payment of the fare, the case did not come within the ambit of the section. But Lord Coleridge dealt with this point by saying (2) "the company cannot exclude any person from the "carriage while there is room and he is ready to pay "his fare. When this condition is complied with the "public have access to the carriage in the same way as "they have to a highway, and the section nowhere "says that 'access' is to mean access without the "obligation of paying anything for it." This passage was relied upon as showing that the absence of a right to refuse entry (such as I have assumed the organisers of this dance to have) was the basis of the

(1) (1882) 10 Q.B.D. 44. (2) Ibid. 47.

decision in *Langrish's* case (1). There is nothing, however, in the reasoning of Stephen J. to support this view. What he says is (2): "It has been urged "that inasmuch as admission in a railway carriage "can only be obtained by paying for a ticket the "carriage is not an open or public place to which the "public have or are permitted to have access. But "there is nothing in the section from which we can "infer that the word 'access' does not include an "access which can only be obtained by a money "payment; and I see no reason in the facts of the "case before us why it should not be brought within "the operation of the statute." In *Airton v. Scott* (3), the question arose whether an athletic ground to which persons were admitted on payment of an entrance fee was "any open space to which the public "had access for the time being." These words were part of the definition of a "public place" contained in a bye-law. The court held that the ground in question was within this definition, Lord Alverstone C.J. observing that "the fact that an admission fee had "to be paid was immaterial; the public had access "and the place was public." The decision most relied upon by the appellant, however, was the recent case of *Glynn v. Simmonds* (4). There, the Queen's Bench Division (Lord Goddard C.J., Devlin and Gorman J.J.) held that Tattersall's enclosure at Goodwood was a "place of public resort" within the meaning of section 4 of the Vagrancy Act, 1824, notwithstanding a charge of 30/- for admission and the right of the occupiers (which was assumed on the facts without evidence) to refuse admission to anyone applying therefor. The material part of Lord Goddard's judgment, in which the other members of the court concurred, is as follows (5): "The question, "however, arises whether this enclosure was a 'place "'of public resort.' They were in Tattersall's en-"closure, to which the public are admitted on payment "of 30s. A place does not cease to be a place of public

(1) (1882) 16 Q.B.D. 44.
(2) Ibid. 47.
(3) (1909) 25 T.L.R. 250.
(4) [1952] 2 All E.R. 47.
(5) Ibid. 48

" resort because the public have to pay to go there.
" An exhibition is obviously a place of public resort.
" The Zoological Gardens are, no doubt, a place of
" public resort because the public are invited to go
" there, and they enter the gardens on payment of a
" sum of money. So is a racecourse—not an open
" course like Newmarket, Brighton or Ascot, but a
" course in a park. They are all places of public
" resort because the owners or occupiers invite the
" public to go there, but it is said that because a
" person who has been warned off, or any other un-
" desirable character, will not be allowed into Tatter-
" salls or into a racecourse, that prevents it from being
" a place of public resort. It must be to some extent
" a question of degree, but I cannot see that property
" to which the owner invites the public to resort
" becomes any the less a place of public resort because
" he refuses to allow a particular individual or in-
" dividuals to enter. If he limits admission to a
" certain category of people, for instance, if he allows
" only members of the universities of Oxford or
" Cambridge to go to a stand or a window he has got
" at the Boat Race, it may be said that that stand or
" window is not a place of public resort. It has been
" suggested to us that a good analogy is the Royal
" Enclosure at Ascot, but that is not a place of public
" resort because the public are not invited to go to the
" Royal Enclosure. Those who wish to go to the
" Royal Enclosure have to apply for permission.
" Everybody is invited to Tattersall's enclosure, sub-
" ject to his paying 30s. and subject to the right of the
" keeper of the gate to say he will not be allowed to
" enter. The justices have found that the enclosure
" was a place of public resort, and, in my opinion, they
" had no option since it did not cease to be a place of
" public resort because a payment for entry was
" demanded, nor, in my judgment, did it cease to be a
" place of public resort because the occupier reserved
" the right to refuse admission to some particular
" individual or individuals."

It seems to me that the decision in *Langrish v. Archer* (1) cannot be explained merely on the ground that the railway company could not exclude anyone ready to pay his fare. Though in *Glynn v. Simmonds* (2) the expression under consideration was "place of public "resort," I think the views of Lord Goddard are applicable in the present instance, for it would be splitting hairs to say that payment and the existence of a right to refuse admission constituted a good defence in one case but not in the other.

To my mind the decisions to which I have referred support the conclusion I have reached on the language of the enactment. For these reasons, I think the learned county court judge was wrong in law and that the question submitted by him should be answered in the negative. The case must go back with a direction to proceed as to justice shall appertain.

PORTER L.J.: A dance organized by the local branch of the British Legion was held in the Aughnacloy Picture House. No tickets were sold for the dance nor were special invitations issued. Persons were admitted on payment at the door, the charge being 7/6 for a gentleman and 5/- for a lady. Between 100 and 150 persons attended the dance.

The defendant was charged at the Aughnacloy Petty Sessions with disorderly behaviour at the dance and was fined and put under a rule of bail for twelve months. He appealed to the Dungannon Quarter Sessions and the county court judge reversed the conviction, quashed the order and dismissed the complaint. The charge was brought under section 59 of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, and the question for this court is whether the county court judge was correct in law in holding that the place in which the dance was being held was not a "place to which the public are "permitted to have access" within the meaning of the section.

When one considers the different categories of places mentioned in the section "any street road

(1) (1882) 10 Q.B.D. 44. (2) [1952] 2 All E.R. 47.

" highway "—" or other public place "—" or any " place to which the public have or are permitted to " have access "—" or any premises licensed for the " sale of intoxicating liquor " they have one feature in common, viz., they are places in which members of the public are likely to be present, and since the dance was publicly advertised and over 100 members of the public attended it, I think that the Picture House on that occasion might fairly be described as a place to which the public were permitted to have access.

Mr. McSparran, however, argued that where there is a charge for admission a person who pays that charge enters not by permission but as of right, because having purchased the right of entry he is entitled to attend the dance by virtue of a contract, and that he attends not as a member of the public but as one of a limited class of persons who have paid for admission.

Now in an ordinary contract for the sale of goods it would be absurd to say that the seller permits the purchaser to become the owner of the goods merely because he has agreed to sell, that is to say, to part with the possession of and the property in the goods to the purchaser but the contract in the present case is quite different. The subject matter is not goods of any description, nor is there any change of possession or ownership. We are dealing with members of the public who accept a public invitation to a dance and are permitted by the organizers of the dance to attend it on payment of the charge for admission. As distinguished from mere or gratuitous licensees such persons are licensees for value or invitees. In *Winter Garden Theatre (London) Ltd. v. Millenium Productions Ltd.* (1), Lord Simon after speaking of gratuitous licences said: " There is another class of licences " which may be called licences for value, in which B. " gives consideration for the permission he obtains " from A.," and as an example of this class he mentions the sale of a ticket for a seat at a particular performance at a theatre or for entering private ground to witness a day's sport.

(1) [1948] A.C. 173, 189.

A licence whether gratuitous or for value necessarily imports permission. On looking into Key and Elphinstone, Precedents of Conveyancing, 10th Ed. (1914), I find that a very common form of a Licence is that in which A for a consideration " grants full licence and " *permission* " to B to do a certain thing.

It is therefore clear that the contract between those who attended and the promoters of the dance was a contract for *permission* to enter and attend the dance.

Mr. McSparran also contended that those who were permitted to attend did not attend as members of the public but as members of a limited class who had paid for admission and were licensees for value. As such they formed a class separate and distinct from the general public, and although the invitation was given to the public, permision to attend was granted not to the public but only to the licensees. Therefore it could not be said that the Picture House was a place to which the public were permitted to have access.

This argument, if it is valid, would apply to numberless other places—concert halls, theatres, cinemas, skating rinks, football and athletic grounds and places of public entertainment. Accommodation being limited imposes a limitation upon the number of those who attend, but it does not follow that they cease to be members of the public by reason of the fact that they are limited in number. As members of the public they are invited, as members of the public they present themselves at the entrance and pay the charge for admission, and as such members of the public they receive permission to enter. No doubt they become licensees but only after permission has been obtained and by virtue of that permission, but at the time when they are receiving permission they are not licensees but members of the public who are willing to pay for admission. As such members they receive permission and I fail to see how they cease to be members of the public merely because having paid for admission they become clothed, as it were, with a licence or permission to enter the premises.

The words in section 59 are virtually the same as the words in section 3 of the Vagrancy Act Amendment Act, 1873, which were discussed in *Langrish v. Archer* (1); and the court in that case (Coleridge L.C.J. and Stephen J.) expressed the opinion that there was nothing in the section to indicate that "access" was intended to mean access without the obligation of paying for it.

In my opinion the Picture House on that occasion was a place to which the public were permitted to have access, and the question should be answered in the negative.

BLACK L.J.: The question for determination in this case is whether the Picture House in Aughnacloy, while the dance was being held on the night of January 31, 1952, was a place to which the public were permitted to have access within the meaning of that phrase as used in section 59 of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935.

The section deals with riotous, disorderly and indecent behaviour "in any street, road, highway, or "other public place, or in any place to which the "public have or are permitted to have access." This phraseology is similar to that used in clause (*h*) of the section substituted by section 57 (1) of the Act of 1935 for section 4 of the Vagrancy Act, 1824. This clause (*h*) deals with gaming "in any street, road, "highway or other public place or in any place to "which the public have or are permitted to have "access." This wording is clearly derived from that of section 3 of the Vagrant Act Amendment Act, 1873, a section which clause (*h*) in section 57 (1) of the Northern Ireland Act of 1935 follows with only a few slight verbal changes. I think that the phrase "to "which the public are permitted to have access" must obviously be given the same interpretation in all these statutory provisions.

If it had been possible to approach the sections without reference to a series of cases decided in the English courts I confess that I should have been

(1) (1882) 10 Q.B.D. 44.

disposed to take the same view of the phrase "to "which the public are permitted to have access" as that taken by the learned county court judge. In its natural meaning the phrase would appear to me intended to indicate a place open to the public at large which the owner or occupier allows all and sundry to enter, such a place, in short, as the scenes of the offences dealt with in *Turnbull v. Appleton* (1) and *Kitson v. Ashe* (2). I think this view is assisted by the preceding words "street, road, highway or "public place." These words all connote places to which the public have free and unrestricted access, and it would seem a legitimate view of the section to infer that Parliament was only intending to legislate in regard to places open to the public, that is to say where anyone who chose could go freely without being turned out by the owners or occupiers, and not in regard to places over the admission to which the owners or occupiers exercised a control.

I do not think that any guidance as to the meaning of the phrase with which we have to deal is to be derived from the definitions contained in section 36 (6) of the Public Health Acts Amendment Act, 1890, and section 1 (4) of the Street Betting Act, 1906, which were so much pressed upon us by counsel for the appellant. No doubt it is possible to speak (as in section 36 (6) of the Act of 1890) of a "place of public "resort" as including a public place of assembly for persons admitted thereto by tickets or by payment, or (as in section 1 (4) of the Act of 1906) of a "public "place" as including an enclosed place to which the public have a restricted right of access whether on payment or otherwise. Such phrases may, in their particular context, clearly be wide enough to include places to which the public are only admitted on payment, especially when such a meaning is supported by a definition clause. But when the phrase "place "to which the public are permitted to have access" is used simpliciter, as in section 59, and especially when it follows the words "street, road, highway, or

(1) (1881) 45 J.P. 469. (2) (1899) 1 Q.B. 425.

"other public place" which clearly indicate places to which the public have unrestricted access, I think it is legitimate to contend that the most natural meaning of the phrase is that it indicates places which the public are permitted to enter without let or hindrance. And I do not think the force of this contention is in any way diminished by the phrase "or on any premises licensed for the sale of intoxi- "cating liquor." When one compares section 3 of the Vagrant Act Amendment Act, 1873, with section 59 of the Act of 1935 it is clear that the reference to premises licensed for the sale of intoxicating liquor is an addition made by the Legislature in 1935 to the list of places which it took from the earlier Act. One can readily understand why this addition was made. But I cannot see how these additional words can legitimately be relied on to give colour to the earlier words of section 59. Can they also give colour to the wording of clause (*h*) of section 57 (1); or is that clause still to be interpreted without their support? To put it at the lowest I should have thought that the view taken by the county court judge was a possible view of the true interpretation of the section, and if that is so there would appear to me to be much force in the argument urged by Mr. McSparran in reliance on such well known dicta as those of Scrutton L.J. in *Remmington v. Larchin* (1), and Lord Simonds in *London and North Eastern Railway Company v. Berriman* (2), that the section, being a penal one the benefit of the doubt should be given to the defendant.

This interpretation of the phrase has not, however, commended itself to the courts in England. The reports contain quite a number of cases in which the English courts have had to consider this phrase "to "which the public are permitted to have access" or the somewhat similar phrase "place of public resort" found in other statutes, and they have consistently held that these phrases are sufficiently wide to include places to which the public are only admitted on payment. The only exception of which I am aware

(1) [1921] 3 K.B. 404, 409-10. (2) [1946] A.C. 278, 313.

is the early case of *R. v. Taylor and Jones* (1), in which Wightman J. held that a steamboat plying on the Thames was not a place of public resort within 5 Geo. IV, c. 83, apparently on the ground that any persons found on it without paying their fares or without leave of the proprietors were trespassers. The point was raised in *Hirst v. Molesbury* (2), but the court expressly abstained from expressing any opinion on it, the case being decided on another ground. However, in *Langrish v. Archer* (3), Lord Coleridge C.J. and Stephen J. expressly decided that a first class railway carriage, when travelling on its journey, was "an open and public place to which the public have or "are permitted to have access" within section 3 of the Vagrant Act Amendment Act, 1873. In coming to this conclusion Lord Coleridge C.J. relied on the consideration that the Company could not exclude any person while there was room and he was ready to pay his fare, but he goes on to say: "When this "condition is complied with the public have access to "the carriage in the same way as they have to a "highway, and the section nowhere says that 'access' "is to mean access without the obligation of paying "anything for it." Stephen J. in a short judgment did not advert to the point that the Company was not entitled to exclude anyone who was ready to pay. He relied simply on the consideration that there was nothing in the section from which it could be inferred that the word access did not include an access which could only be obtained by a money payment. *Langrish v. Archer* (3) may not be an altogether satisfactory case. It is hard to see how a first class carriage could legitimately be described as an open as well as a public place. However, the decision is undoubtedly in point on the wording which we have to consider in the present case.

Langrish v. Archer (3) was followed in the later case of *Airton v. Scott* (4). This case arose on the wording of a

(1) (1857) 21 J.P. 488.
(2) (1870) L.R. 6 Q.B. 130.
(3) (1882) 10 Q.B.D. 44.
(4) (1909) 25 T.L.R. 250.

byelaw which provided that no person should frequent and use any street or public place for the purpose of bookmaking or betting. Public place was defined as including inter alia any open space to which the public had access for the time being. The place in which the offence was alleged to be committed was an athletic ground where a payment had to be made to gain admission. The Court (Lord Alverstone L.C.J. and Bigham and Walton JJ.) held that notwithstanding the charge for admission the ground was nevertheless a place to which the public had access and the fact that they had to pay made no difference.

This view seems now to be accepted in England. In *Everett v. Shand* (1), the point discussed before the King's Bench Division was whether betting by means of a totalisator at a greyhound racing track constituted an offence under section 3 of the Vagrant Act Amendment Act, 1873. From the report of the case I think it may be taken that a charge was made for admission to the track. It does not appear to have been even argued on behalf of the defendants that the track was not an open place to which the public were permitted to have access within the meaning of the section, though so far as I can see the point was open upon the case stated if it had been thought worth while to make it.

In *Clark v. Taylor* (2), the appellant was charged with frequenting a place of public resort with intent to commit a felony contrary to section 4 of the Vagrancy Act, 1824. The scene of the alleged offence was Plumpton racecourse. It does not appear from the report whether a charge had to be paid for admission to the racecourse. But if the fact was that an admission charge had to be paid the case was apparently allowed to pass without any contention being raised that the racecourse was not a place of public resort.

The point was, however, raised in the recent case of *Glynn v. Simmonds* (3). This, again, was a prosecution under section 4 of the Vagrancy Act, 1824. The

(1) [1931] 2 K.B. 522.
(2) (1948) 112 J.P. 439.
(3) [1952] 2 All E.R. 47.

scene of the offence in this case was Tattersall's enclosure at Goodwood racecourse to which the public were admitted on payment of a charge of 30s. The Court (Lord Goddard C.J., Devlin and Gorman JJ.) held that the enclosure was a place of public resort notwithstanding the charge for admission and notwithstanding that it was assumed that the occupiers reserved the right to refuse admission to any individuals whom they might think it desirable to exclude.

Although this court is not bound by the decisions of Divisional Courts in England, yet the strong current of English authority must carry considerable weight. In matters of this kind, as has, I think, been said both in the Scottish and in the Irish courts, it is undesirable that different interpretations should be put upon the same form of words by courts in different parts of the United Kingdom. There is moreover, another consideration to which I think some further weight may legitimately be attached. Where words and expressions used in an Act of Parliament are plainly taken from earlier statutes dealing with similar subject matter, and those words and phrases have received judicial interpretation, it is a fair presumption that Parliament intended that the language so used by it in the later statute should be given the meaning which has been judicially attributed to it. No doubt the statutes from which the form of words used in section 59 of the Northern Ireland Act of 1935 was taken were English statutes (the Vagrant Act Amendment Acts of 1868 and 1873) which did not apply to Ireland, and the decisions which interpreted that form of words were English decisions. Nevertheless, the phrase "street, road, highway or other public place" or any place to which the public have or are permitted to have access" is so palpably taken from the English statutes that I think it may be a legitimate inference that in adopting the phrase in 1935 the Northern Ireland Legislature adopted it with the meaning which had by then been definitely attached by the decisions of the English courts to the words

" to which the public are permitted to have access " (1).

In view of these considerations I feel that I ought not to dissent from the conclusion at which the other members of the court have arrived, although if the matter had been res integra I should have taken the same view as the learned county court judge.

Appeal allowed.

Solicitor for the appellant : *Chief Crown Solicitor.*
Solicitor for the respondent : *P. Cush.*

J.P.

(1) See on this point the observations of the Judicial Committee of the Privy Council in *Cooray v. The Queen* [1953] 2 W.L.R. 971-2.—EDITOR.

FITZHARRIS v. STRAIN (1).

Revenue—Customs—Motor vehicle suspected of carrying uncustomed goods—Failure to stop at request of officer—Whether vehicle liable to forfeiture—Irish Free State (Consequential Provisions) Act, 1922 (13 Geo. 5, sess. 2, c. 2), s. 4—Customs (Land Boundary) Regulations, 1933 (S.R. & O., 1933, No. 240), reg. 12 (2) (2).

Section 4 (1) of the Irish Free State (Consequential Provisions) Act, 1922, provides for the making of regulations with reference to the importation and exportation of goods into and from Northern Ireland otherwise than by sea or aircraft, and section 4 (2) provides that if any person contravenes or fails to comply with such a regulation he shall be guilty of an offence and prescribes penalties, and further provides that "the goods in respect of which the offence is committed shall be forfeited."

By regulation 12 (2) (2) of the Customs (Land Boundary) Regulations, 1933, made under the aforementioned section every person in charge of any merchandise or of any vehicle travelling within twenty miles of the boundary shall upon request by a customs officer stop such merchandise or vehicle and allow the officer to examine the same and the goods therein and to take an account thereof.

A motor van being driven within twenty miles of the boundary failed to stop when signalled so to do by a customs officer who suspected it was being used for the carriage of uncustomed goods. It was later stopped by the police who found that it was not carrying uncustomed goods.

Held, that the provision in section 4 relating to forfeiture of "the goods in respect of which the offence is committed" did not apply to the van since there was no infringement of the regulations with respect to the importation or exportation of the van, and that accordingly the van was not liable to forfeiture.

CASE STATED by the County Court Judge for the County of Tyrone.

The driver of a motor van belonging to the respondent while travelling on a route within twenty miles of the boundary between Northern Ireland and the Republic of Ireland was requested to stop by a customs officer who suspected that the van was being used to carry uncustomed goods. In contravention of regulation 12 (2) (2) of the Customs (Land Boundary) Regula-

(1) In the Court of Appeal before Lord MacDermott L.C.J., Porter and Black L.JJ.; November 10, 1952; January 12, 1953.

tions, 1933, which were made under and by virtue of section 4 of the Irish Free State (Consequential Provisions) Act, 1922, the driver failed to stop the van and allow it to be examined. The van was later stopped by the police who found no goods in it. The van was seized as being liable to forfeiture under subsection (2) of section 4 of the Act of 1922, although it was at all material times legally in Northern Ireland and was never suspected of being the subject of illegal importation or exportation. The respondent having claimed the van, the appellant, an officer of Customs and Excise, applied at Cookstown Petty Sessions for an order for its forfeiture and condemnation. The resident magistrate having found the above facts was of opinion that the van was liable to forfeiture and he ordered accordingly.

The respondent appealed to Quarter Sessions and the county court judge refused the application for forfeiture and condemnation, and further refused an application by the appellant for a certificate that there was reasonable and probably cause for the seizure of the van, but at the request of the appellant he stated this case for the opinion of the Supreme Court as to whether he was correct in law.

Nicholson Q.C. and *Lowry* for the appellant argued that the regulation required vehicles to stop at the request of a customs officer, that the van in this case failed to stop, and that therefore there had been an offence committed in respect of the van; motor vehicles were within the ordinary meaning of the word " goods " and the van must be treated as " goods " in respect of which the offence is committed."

Agnew Q.C. and *McGonigal* contended that the section and the regulation made a clear distinction between the goods and the vehicle in which the goods were being carried; an offence could have been committed with respect to the van if an attempt had been made to import it or to export it illegally, but no such offence was either committed or suspected by the officer who tried to stop it; the customs authorities had ample powers to seize vehicles being used for

smuggling under section 202 of the Customs Consolidation Act, 1876, and there was no reason to construe these provisions as extending those powers so as to allow forfeiture upon a mere suspicion of smuggling; the regulations were ambiguous and should therefore be construed in favour of the subject.

Cur. adv. vult.

LORD MACDERMOTT L.C.J.: Both the questions submitted by the learned county court judge should, in my opinion, be answered in the affirmative. I need not set out the reasons that have led me to this view. I have had the advantage of reading the judgment about to be delivered by Black L.J. and I agree with his conclusion and the grounds on which it is based so fully, that I have nothing to add.

PORTER L.J.: On August 25, 1951, a motor van belonging to the defendant was being driven on a road within 20 miles of the border when it was summoned to stop by Sergeant Gibson, who was then on customs patrol and had reason to believe that on that day uncustomed cigarettes and tobacco would be conveyed on that road in two motor vehicles. The driver refused to stop, but shortly afterwards the van was stopped at Ballyronan by members of the Royal Ulster Constabulary, who found nothing therein. The van was seized as being liable to forfeiture under section 4 (2) of the Irish Free State (Consequential Provisions) Act, 1922. The defendant having claimed the van, proceedings were instituted by the complainant, one of Her Majesty's Officers of Customs and Excise, for the forfeiture and condemnation of the van under section 207 of the Customs Consolidation Act, 1876.

On March 29, at Cookstown Petty Sessions, an order was made for the forfeiture and condemnation of the van.

The defendant appealed against this order to the Quarter Sessions held at Dungannon on April 7, 1952,

and the county court judge refused the application for the forfeiture and condemnation of the van and also refused an application by the complainant for a certificate that there was reasonable and probable cause for the seizure of the van.

The question for the court is whether he was right in refusing both these applications.

The county court judge was of opinion that the term " goods " in the penultimate line of section 4 (2) was referable only to goods being imported or exported and not to the vehicles carrying the goods.

Section 4 which makes provision for the application of the Customs Acts to the land frontier authorized the Commissioners of Customs and Excise " to make " regulations with reference to the importation and " exportation of any goods into and from Northern " Ireland otherwise than by sea or in aircraft, for the " purpose of safeguarding the revenue and preventing " and regulating the importation and exportation of " prohibited and restricted goods, and by such regulations to apply to such importation and exportation " any of the provisions of the Customs Acts subject to " such modifications as may be necessary to adapt " them to the importation and exportation of goods by " land . . . . "

Sub-section (2) is as follows :—

" If any person contravenes or fails to comply " with any such regulation, he shall be guilty of an " offence under the Customs Acts and shall for " every such offence, in addition to any other penalty " to which he may be liable, incur a fine not exceeding one hundred pounds, and the goods in respect " of which the offence is committed shall be forfeited."

The particular regulation with which we are concerned is contained in regulation 12 (2) (2) of the Customs (Land Boundary) Regulations, 1933, and is as follows :—

" Every person in charge of any merchandise or " of any vehicle, whether laden or unladen, travelling " at any time upon any route within twenty miles

" of the boundary shall upon request by any Officer " who shall have reasonable suspicion or probable " cause, stop such merchandise or such vehicle and " allow such officer to examine the same and any " goods therein, and to take an account of such " merchandise or goods."

The validity of this regulation was not impugned in this court, though it would appear to be an interference with the ordinary course of internal trade or business rather than a regulation relating to the importation and exportation of goods. It might perhaps be defended as being reasonably necessary to safeguard the revenue in view of the extraordinary difficulties encountered by the customs officers in detecting and preventing the smuggling of goods across the land frontier and also on any route within twenty miles from it. However that may be I do not think that the word " goods " whether in the regulation or in the penultimate line of section 4 (2) should be confined to goods which are being imported or exported. Suppose that the motor van in question had contained goods and that the driver of the van had stopped at the request of the officer, but had refused to allow him to examine the goods, that would be a contravention of the regulation, and the goods in the van would be liable to forfeiture—even if they were not the subject of an attempt to evade customs duties or regulations, but were being lawfully conveyed in the ordinary course of trade or business between two places in Northern Ireland.

Mr. Nicholson contends that " goods " has a wider signification, including not merely such goods as may be contained in the vehicle, but also the vehicle itself. " Goods " used in a general sense would of course include vehicles, and in order to show that this is the meaning of the word in the penultimate line of section 4 (2) he refers us to several expressions in section 4 (1)—the words " any goods " in the phrase " with reference " to the importation and exportation of any goods " and the words " all goods or any classes of goods " in the phrase " the importation and exportation of all

"goods or any classes of goods." If such a wide meaning is to be given to the word in this subsection, it would include the vehicle in question even though it had not been the subject of illegal importation.

It is a general rule of interpretation that a word which occurs in several places in the same section should be given the same meaning in each place, but this is a rule which should be applied with great caution, particularly when the word is accompanied by other words which would qualify or restrict its meaning. For example I think it could be urged with equal force that the word "goods" refers only to goods which have been or are being imported or exported, and that the forfeiture was never intended to operate upon any goods unless in their importation or exportation there was some breach of the Customs Acts or the regulations. If this is the true meaning the motor van would not be liable to forfeiture, but I do not think we should decide the question merely by an examination of the language of the section which imposes the penalty without considering the character of the offence committed by the driver of the van in breach of the duty which is prescribed by the regulation 12 (2) (2), and it is also relevant to consider if any light is thrown upon the question by those sections of the Customs Consolidation Act, 1876, which are in pari materia with the section and the regulation, and more particularly sections 202 and 203 of which regulation 12 (2) (2) is obviously an adaptation. The contrast in the regulation between the vehicle and the goods contained therein is also to be found in various sections of that Act, but more particularly in the sections I have mentioned. Instead of the word "vehicle" section 202 specifies all ships boats carriages or other conveyances, and contains an express provision for forfeiture if they are used in the importation, landing, removal or conveyance of any uncustomed prohibited restricted or other goods liable to forfeiture. Section 203 does not use the word "vehicle" but authorizes customs officers upon reasonable suspicion or probable cause to stop any cart, waggon or other con-

veyance to ascertain whether any smuggled goods are contained therein. In framing section 4 of the 1922 Act the Legislature must be deemed to have had full knowledge of the contrast contained in these sections between the "goods" and the conveyance or vehicle in which they are carried, and it is not unreasonable to suppose that this contrast is imported into the section by the penalizing words which refer only to the goods and not to the vehicle containing them.

When the penalizing clause is read in conjunction with the regulation I think it is almost impossible to hold that the motor van could be included in the term "goods." The regulation prescribes that the person in charge of the vehicle "shall stop such *vehicle* and "allow such officer to examine the *same* and *any goods* "*therein* and to take an account *of such goods*" and the penalizing section says that a person contravening the regulation is guilty of an offence under the Customs Acts, and in addition to any other penalty to which he may be liable shall incur a fine not exceeding £100 and the *goods* in respect of which the offence was committed shall be forfeited.

If the words of the subsection imposing the penalty are read and compared with the words of the regulation, it is manifest that "goods" in the subsection does not include the vehicle in which the goods (if any) are being carried, and we could not hold otherwise without doing violence to the language and at the same time transgressing the well settled rule that no penalty is incurred unless the words of the enactment imposing it are clear and unambiguous.

In my opinion the county court judge was right in refusing both applications.

BLACK L.J.: This case turns on the meaning to be attached to the words "the goods in respect of which "the offence is committed" contained in subsection (2) of section 4 of the Irish Free State (Consequential Provisions) Act, 1922.

Subsection (1) of section 4 enacts that it shall be lawful for the Commissioners of Customs and Excise to make regulations with reference to the importation

and exportation of any goods into and from Northern Ireland otherwise than by sea and in aircraft, and provides that in particular the regulations may prohibit the importation and exportation of all goods or any classes of goods except by such routes within Northern Ireland and during such hours as may be prescribed.

Subsection (2) of section 4 provides that if any person contravenes or fails to comply with any such regulation he shall be guilty of an offence under the Customs Acts and shall for every such offence, in addition to any other penalty to which he may be liable, incur a fine not exceeding one hundred pounds, and the goods in respect of which the offence is committed shall be forfeited.

It seems to me quite clear on the ordinary natural construction of the section that the phrase in subsection (2) " the goods in respect of which the offence " is committed " must mean goods in regard to which there has been some infringement of regulations made under subsection (1) with reference to their importation or exportation.

No provision is made in section 4 (such as that in section 202 of the Customs Consolidation Act, 1876) for the forfeiture of vehicles carrying goods which are being conveyed or otherwise dealt with in contravention of regulations made under subsection (1) of section 4. Only goods which are themselves being dealt with in breach of regulations made with reference to their importation or exportation are forfeitable under section 4.

In the present case it is found as a fact that at all material times the motor van was legally in Northern Ireland, and that the officer who called upon it to stop did not do so because of any suspicion that the vehicle itself was being illegally imported. No suggestion ever appears to have been made that the motor van was being used in contravention of any regulation made with reference to its importation or exportation. Accordingly I am of opinion that the

motor van was not forfeitable under the provisions of section 4 (2) of the Act of 1922, and that the first question submitted in the case stated should be answered by declaring that the learned county court judge was correct in refusing the application for forfeiture and condemnation of the motor van.

As regards the second question submitted in the case stated, Mr. Nicholson intimated that if the court held that the motor van was not forfeitable, so that its seizure was based on a mistaken interpretation of the legal effect of section 4 (2) of the Act of 1922, he would not seek to argue that the county court judge was wrong in law in refusing to give a certificate that there was reasonable or probable cause for the seizure. The second question should, therefore in my opinion, also be answered by declaring that the county court judge was correct in law in refusing the certificate.

Appeal dismissed.

Solicitor for the appellant : *Chief Crown Solicitor.*
Solicitors for the respondent : *Shields & Murnaghan.*

J.P.

ULSTER TRANSPORT AUTHORITY v. JAMES BROWN & SONS, LTD. (1).

Northern Ireland—Constitutional law—Validity of statute—Act of Northern Ireland Parliament purporting to limit business of furniture removers—"take any property without compensation"—Government of Ireland Act, 1920 (10 & 11 *Geo.* 5, *c.* 67), *s.* 5 (1)—*Transport Act (Northern Ireland)*, 1948 (12 & 13 *Geo.* 6, *c.* 16), *ss.* 18, 19.

Case—Authority as precedent—Judgment pronounced without jurisdiction.

S. 5 (1) of the Government of Ireland Act, 1920, prohibits the Parliament of Northern Ireland making a law so as either directly or indirectly to take any property without compensation.

S. 18 (1) of the Transport Act (Northern Ireland), 1948, prohibits the use by any person other than the Ulster Transport Authority of a motor vehicle on a public highway to carry for reward any passengers or luggage or merchandise except with the consent of the Authority and the approval of the Ministry of Commerce. S. 19 (1) excepts from the restrictions imposed by s. 18 (1) the use by furniture removers of motor vehicles "to move furniture or effects, not being part of the stock in trade of the owner thereof, from or to premises occupied by such owner to or from other premises occupied by such owner or to or from a store."

Furniture which had been purchased as stock in trade by a dealer at an auction mart was carried by the respondents, a firm of furniture removers, from the mart to the dealer's premises without the consent of the Authority and without the approval of the Ministry. In answer to a summons for an offence against s. 18 (1) it was contended by the respondent that this section was ultra vires the Parliament of Northern Ireland in that it was a taking of property without compensation contrary to s. 5 (1) of the Act of 1920.

Held, by the Court of Appeal (Lord MacDermott L.C.J., Porter and Black L.JJ.), that the respondents' interest in continuing to carry on furniture removal work of the type prohibited by s. 18 (1), as modified by s. 19 (1), whether such interest was to be regarded as goodwill or as an interest distinct from goodwill, was property within the meaning of s. 5 (1) of the Act of 1920.

(1) In the Queen's Bench Divisional Court before Sheil and Curran JJ.; Dec. 2, 3, 4, 1952; Jan. 22, 1953. In the Court of Appeal before Lord MacDermott L.C.J., Porter and Black L.JJ.; April 27, 28, 29, June 29, 1953.

The word " property " in s. 5 (1) of the Government of Ireland Act, 1920, is not to be restricted to tangible property *ejusdem generis* as the other forms of property mentioned in that section.

Held, further, that since the intention of the Act of 1948 was to divert to the Authority the business which was prohibited to the respondents there was a taking over of property belonging to the respondents without compensation, and that accordingly s. 18 (1) of the Act of 1948 was ultra vires in so far as it purported to prohibit the use of a motor vehicle for the collection or delivery of furniture by a person in connection with his business as a remover or storer of furniture.

Quaere whether a taking of property by dissipation or destruction without a " taking over ", or a negative prohibition which merely interferes with the enjoyment of property, is a taking of property within the meaning of s. 5 (1) of the Act of 1920.

Semble that the decision of the Court of Appeal in Northern Ireland in *Northern Ireland Transport Board v. Benson* [1940] N.I. 133 is not binding as an authority since the judgments were pronounced without jurisdiction.

Observations on the proper form of order where legislation of the Parliament of Northern Ireland is held to be ultra vires as regards some particular subject matter, activity or application.

Decision of a Divisional Court of the Queen's Bench Division (Sheil and Curran JJ.) affirmed.

APPEAL to the Court of Appeal pursuant to section 50 of the Government of Ireland Act, 1920, from a decision of a Divisional Court of the Queen's Bench Division on the hearing of a case stated by the Resident Magistrate for County Tyrone sitting at Dungannon Petty Sessions.

On April 19, 1951, Arthur Patrick McGrath, a furniture dealer carrying on business at Coalisland in the County of Tyrone, purchased a quantity of furniture for the purpose of his business at an auction held by Messrs. John Ross & Co., auctioneers and valuers, at their auction mart in the City of Belfast. On the following day, April 20, 1951, on the order of Messrs. John Ross & Co. this furniture was carried from Belfast to Coalisland to the premises of Arthur Patrick McGrath in a motor vehicle belonging to James Brown & Sons, Ltd., (hereinafter referred to as the respondents), furniture removers carrying on business in Belfast.

On October 22, 1951, the respondents were charged at the petty sessions held at Dungannon on the information of the Ulster Transport Authority (hereinafter referred to as the Authority) with an offence against section 18 (1) of the Transport Act (Northern Ireland), 1948 (1) in that they being persons other than the Ulster Transport Authority and without the consent in writing of the Authority and the approval of the Ministry of Commerce for Northern Ireland did use a motor vehicle on the public highway to carry for reward merchandise contrary to the said section.

In answer to the charge it was contended by the respondents that section 18 (1) of the Transport Act (Northern Ireland), 1948, was ultra vires by reason of section 5 (1) of the Government of Ireland Act, 1920. (2).

(1) Transport Act (Northern Ireland), 1948, s. 18 (1): "Save "as provided by the next succeeding section of this Act, "a person other than the Authority "shall not, except with the consent "in writing of the Authority and "the approval of the Ministry, use "a motor vehicle on a public high- "way to carry for reward any "passengers or any luggage or "merchandise. A consent required for the purposes of this "section may be granted for such "period and subject to such conditions as the Authority, with "the approval of the Ministry, may "determine." S. 19 (1): "The "provisions of the last preceding "section shall not apply to or "affect— . . . . . "(*d*) the use, by a person who "carries on, from a principal "place of business in Northern "Ireland, the business of a "remover or storer of furniture, "of a motor vehicle to move "furniture or effects, not being "part of the stock in trade of the "owner thereof, from or to "premises occupied by such "owner to or from other premises occupied by such owner "or to or from a store."

(2) Government of Ireland Act, 1920, s. 5 (1): "In the exercise of "their power to make laws under "this Act neither the Parliament of "Southern Ireland nor the Parliament of Northern Ireland shall "make a law so as either directly "or indirectly to establish or "endow any religion, or prohibit or "restrict the free exercise thereof, "or give a preference, privilege, or "advantage, or impose any disability or disadvantage, on "account of religious belief or "religious or ecclesiastical status, "or make any religious belief or "religious ceremony a condition of "the validity of any marriage, or "affect prejudicially the right of "any child to attend a school "receiving public money without "attending the religious instruction

At the hearing before the resident magistrate the following facts were proved or admitted :

(1) At all material times Arthur Patrick McGrath was a furniture dealer and occupied premises at Main Street, Coalisland in the County of Tyrone where he carried on the business of furniture dealer.

(2) At all material times the respondent carried on the business of a remover and storer of furniture in, and from, premises situate in the City of Belfast.

(3) Arthur Patrick McGrath on April 19, 1951, purchased a quantity of furniture for the purpose of his business at an auction held by Messrs. John Ross & Co., auctioneers and valuers, at premises occupied by them in the City of Belfast.

(4) On April 20, 1951, this furniture was carried on the public highway in a motor vehicle the property of the respondent from the premises of Messrs. John Ross & Co. to the premises of Arthur Patrick McGrath in Coalisland on the orders of Messrs. John Ross & Co.

(5) The furniture was carried by the respondents in their motor vehicle for reward.

(6) The respondents did not have the consent in writing of the Authority or the approval of the Ministry of Commerce for Northern Ireland to use a motor vehicle on a public highway to carry merchandise for reward.

(7) The respondents have carried on the business of furniture removal and storage since 1898, and the furniture removal business is a substantial business from which the respondents have throughout this period and up to the present time made, and do make, substantial profits.

(8) The furniture removal business of the respondents has, since 1898, involved the removal and

" at that school, or alter the con-
" stitution of any religious body
" except where the alteration is
" approved on behalf of the re-
" ligious body by the governing
" body thereof, or divert from any
" religious denomination the fabric
" of cathedral churches, or, except
" for purposes of roads, railways,
" lighting, water, or drainage
" works, or other works of public
" utility upon payment of com-
" pensation, any other property, or
" take any property without com-
" pensation."

carriage, throughout the whole of what is now Northern Ireland, of furniture, to and from the quays and premises of furniture dealers, furniture manufacturers, furniture vendors and purchasers, auctioneers, private persons and the respondents' own premises.

(9) The firm of Messrs. John Ross & Co. are not storers of furniture and their premises are not a store.

(10) If the respondents are prohibited by the operation of the Act of 1948 from carrying furniture to or from the premises of Messrs. John Ross & Co. the Authority will have to be employed to do the work or any part thereof which the respondents may be prevented from doing.

(11) The goodwill of the respondents' business as a furniture remover, at the time of the passing of the Act of 1948, applied to the carriage of furniture in the manner objected to in these proceedings, and until the institution of these proceedings the Authority took no step to prevent the respondents from exercising its business.

(12) If the respondents are prohibited by the operation of the Act of 1948 from carrying furniture to or from the premises of Messrs. John Ross & Co., then in addition to losing work for that firm they would also, from that cause alone, lose important and substantial business connections and work arising therefrom and goodwill, and their furniture removal business would be seriously and adversely affected.

(13) The Authority does all kinds of furniture removal work and has been doing so since its creation by the Act of 1948, since when it has been in active competition with the respondents. Before 1948 the Authority's predecessor, the Northern Ireland Transport Board, carried on all kinds of furniture removal work since its creation by the Road and Railway Transport Act (Northern Ireland), 1935.

(14) The Authority, taking advantage of the provisions of the Act of 1948, wishes and intends if possible, to acquire a monopoly in furniture removal work.

(15) There is a very considerable goodwill attaching

to the respondents' furniture removal business, which goodwill is quite separate and distinct from that of any other business carried on by the respondents.

(16) There is no person or body other than the Authority legally entitled, under the provisions of the Act of 1948, to perform that part of the business of the respondents which the Act of 1948 purports to prohibit the respondents from performing.

(17) The operation of sections 18 and 19 of the Act of 1948 will cause the respondents to lose a substantial amount of their furniture removal business.

(18) The respondents have received no compensation for or in respect of that portion of their furniture removal business which by reason of the operation of the Act of 1948 they will lose, and there is no provision for payment of compensation in the Act of 1948.

After hearing the evidence and arguments the resident magistrate decided :

(1) that the business of which section 18 (1) of the Act of 1948 purports to deprive the respondents is not property within the meaning of section 5 (1) of the Government of Ireland Act, 1920.

(2) that goodwill is not property within the meaning of section 5 (1) of the Government of Ireland Act, 1920.

(3) that there was no "taking" within section 5 (1) of the Government of Ireland Act, 1920.

(4) that section 18 (1) of the Transport Act (Northern Ireland), 1948, is not ultra vires.

He accordingly convicted the respondents but stated a case for the opinion of the High Court as to whether he was right in law in so holding.

The case stated was heard in a Divisional Court of the Queen's Bench Division consisting of Sheil and Curran JJ.

McVeigh Q.C., *Jones Q.C.* and *MacDermott* for the respondents (the appellants before the Divisional Court).

Nicholson Q.C., *Harrison Q.C.* and *Gibson* for the Authority.

Cur. adv. vult.

SHEIL J: Four questions have been asked in the case stated, but the answers to the first three questions must necessarily determine the answer to the fourth question, since if by virtue of the Transport Act (Northern Ireland), 1948, the property of the appellants (to whom I will hereinafter refer as " the Company ") has been taken it has been taken without compensation, and to that extent the Act would be void as contravening the restrictions imposed on the legislative powers of the Parliament of Northern Ireland by section 5 (1) of the Government of Ireland Act, 1920.

It was not disputed either at petty sessions or here that, on the occasion complained of in the summons, the Company had acted in contravention of section 18 of the Transport Act, 1948. The saving provisions of section 19 have not been invoked. On April 20, 1951, the Company used a motor vehicle on the public highway to carry for reward merchandise. The case stated finds as a fact that the Company had been doing so for many years, and that, if the decision of the learned resident magistrate be correct this work will in future be done exclusively by the respondents, to whom I will refer as " the Authority ". The case recites the wish of the Authority to acquire a monoply of this class of work (furniture removal other than that excepted by section 19 (1) (*d*)), and I cannot doubt that such is the declared object and effect of section 18 (1). It is further found, as a fact, and therefore indisputable, that if the Company is prevented from carrying on this work it will suffer, directly and indirectly, substantial loss.

The 1948 Act differs materially from the Road and Railway Transport Act (Northern Ireland), 1935. Under the earlier Act the Board created by the Act was obliged to acquire every road motor undertaking to which that Act applied (section 5) and was obliged to pay consideration for all undertakings so acquired (section 6), and it was admitted here, and indeed is matter of common knowledge, that consideration was paid, and properly paid, not only for actual vehicles and stock in trade, but also for the goodwill of under-

takings acquired. Certainly, except for such a case as fell to be considered in *Northern Ireland Road Transport Board v. Benson* (1), a case which must later be discussed, it could not be said that section 5 of the Government of Ireland Act, 1920, was in any way contravened by any part of the Northern Ireland Act of 1935. The 1948 Act on the other hand does not anywhere provide in terms for the acquisition of any undertaking. Neither is there any provision for payment of consideration or compensation, and it is said properly so, because, it is said, no property has been or will be taken from the Company or anyone else. This is the kernel of the case now before us, and I must now examine this proposition and it can most conveniently be done by taking in their order the questions submitted by the learned resident magistrate.

Is that which the Company is to lose "property" within the meaning of section 5 of the 1920 Act? It is said for the Authority that that section had in contemplation only land, or a right or interest in land or a chattel—in other words a tangible asset—and that while goodwill as attached to such asset may well be property, goodwill divorced from such an asset is not property—that there cannot be goodwill in gross. Our attention was drawn to the only property specified in the section—the fabric of cathedral churches—and we were told that pointed to a concept of property as something visible and tangible. I am quite satisfied that goodwill can be as much property as a piece of land or a chattel. I do not pause to consider such rights as trade marks, patents or copyright, though I am satisfied that they are property, because during the argument there occurred to me a much more homely and simple right, well recognised in this community—a milk round. I can quite easily visualise the case of a milkman retiring from business and selling without any transfer of his vehicles or premises, a list of his customers or a list of his customers in one particular area. The purchaser would not on such a sale become entitled to compel the customers to buy milk from the purchaser, but without doubt it would be of great

(1) [1940] N.I. 133.

benefit to him to be able to say truthfully to such customers that he had the good wishes and blessing, or shall I say, the goodwill of their former supplier. Another example comes to mind. I do not know whether modern legislation has put an end to what was certainly at one time a lucrative business, the weekly collection of insurance premiums on small benefit policies. There was, and there may still be a well-known transaction in which a man purchased what was called an insurance book. It is true that the insurance might have been effected with a well-known insurance company, but an income was to be made by the collection of premiums, and collectors could, and did, sell books which were a list of insured persons. Some person would collect the premiums, and it was worth money, and worth payment to an outgoing agent, that the transferee should be that person. Indeed one thinks of an agent selling goods on commission who, apart from any premises or offices or samples he may have, has by what I may call "the "personal touch," built up a good business which he can sell. I can think of no other word which precisely describes all these examples except goodwill.

But apart from these illustrations there is the highest authority that goodwill is property. In *Potter v. I.R.C.* (1) Pollock C.B. says "very frequently the "goodwill of a business or profession, without any "interest in land connected with it, is made the subject "of sale, though there is nothing tangible in it ; it is "merely the advantage of the recommendation of the "vendor to his connections and his agreeing to abstain "from all competition with the vendee. Still it is a "valuable thing belonging to himself, and which he "may sell to another for pecuniary consideration." In *I.R.C. v. Muller & Co.* (2) Lord Macnaghten says : "Goodwill is bought and sold every day. It may be "acquired, I think, in any of the different ways in "which property is usually acquired. When a man "has got it he may keep it as his own. He may "vindicate his exclusive right to it, if necessary by

(1) (1854) 10 Exch. 147, 157. (2) [1901] A.C. 217, 223.

" process of law. He may dispose of it if he will—of " course under the conditions attaching to property " of that nature." It may be noticed too in the same case that one of the examples of goodwill mentioned in argument by the Attorney-General was " where a " personal reputation of the trader has been acquired " which attracts customers." (1).

I am thus satisfied that goodwill which is of money value is property, that it can be essentially personal, that the goodwill in the present case is of money value and personal to the Company, and that the limited construction contended for by counsel for the Authority should be rejected and that the learned resident magistrate misdirected himself in his answers to the first two questions.

Assuming that the Company has been deprived of goodwill (not necessarily of its entire goodwill) and that goodwill is property, I turn to consider whether that property has been taken by the operation of the 1948 Act. Mr. Nicholson for the Authority has desired to have kept open the question whether the concluding phrase in section 5 (1) of the 1920 Act " or take any " property without compensation " does not apply only to property of a religious denomination. For myself I entertain no doubt on that point. To my mind it is quite clear that the section prohibited absolutely the diversion from a religious denomination of the fabric of cathedral churches, and prohibited the diversion from a religious denomination of any other of its property except for certain public purposes, and then only on payment of compensation. To hold that the concluding phrase of the section referred only to a religious denomination would render the preceding safeguard valueless, since what could not be diverted could be taken. I do not think that anything is to be gained by debating the relative meanings of the words " divert " and " take." So far as cathedral churches are concerned I think the Legislature was seeking to prevent the transfer of such churches from one religious body to another being sought to be justified on the ground that one Christian

(1) Ibid. 220.

religion is as good as another, and that all were working for the same good purpose. When one comes to consider the word " divert " in reference to any other property of such religious denomination the matter may not be just so simple, but I think the principle is the same, namely an effort to prevent under any guise the loss by a religious denomination of any of its property except for the purposes stated.

But we are here concerned with the words " take any " property " and it is to be observed that the section renders void any law which *directly or indirectly* takes any property without compensation. I do not think that it was argued that the words " directly or in- " directly " did not apply to such taking. If it was argued it was not pressed. Suffice it to say that to construe the section as only prohibiting direct or indirect establishment or endowment of any religion, but permitting an indirect preference or disability on account of religious belief or an indirect diversion of the fabric of cathedral churches would be to render the whole section, with the exception of the phrase immediately following the words " directly or in- " directly " quite useless as a protection to any minority.

Has then section 18 of the 1948 Act directly or indirectly taken the Company's property ? What is the meaning of the word " take " in the last phrase ? The learned resident magistrate has found that the Company will lose goodwill directly and indirectly, and for the reasons stated, that goodwill is, in my opinion, property. Again we meet the contrast between the Road and Railway Transport Act (Northern Ireland), 1935, and the Transport Act (Northern Ireland), 1948. Shortly the argument for the Authority is this. Parliament has not " taken " anything from the Company. It has only forbidden the Company to carry on part of its business leaving the rest untouched. But that part of its business, that part of its goodwill, its property, must go from the Company because of the prohibition. Whither must it go ? As I have already stated section 18 (1) leaves that in

no doubt because since no person other than the Authority, except with a consent and approval not here in issue, shall carry merchandise in the circumstances involved in this case, this part of the Company's business must necessarily accrue to the Authority. The Authority will and must get what the Company must lose, and I may here say that I respectfully agree with the assumption of Andrews L.J. in *Robb v. Electricity Board for Northern Ireland* (1) that section 5 of the 1920 Act prohibited the Parliament of Northern Ireland from making a law authorising property to be taken.

The Company then will lose something and the Authority will gain that something, but it is said for the Authority that nothing has been taken from the Company and reliance is placed on the judgments of Andrews L.C.J. and Murphy L.J. in *Benson's* case (2). Two comments must be made about the decision in that case. It was concerned with a different statute though one which was largely *in pari materia* with the statute under review, and as the House of Lords held in 1942 that the case should never have been considered by the Court of Appeal since no appeal lay, I have been in a difficulty as to the binding authority of the decision of the Court of Appeal. I have come to the conclusion that, in view of the unanimous opinion of the House of Lords, this court is not bound by the decision of the Court of Appeal as having been given without jurisdiction. But I certainly would, and do pay the most profound respect to the opinions of the learned and experienced members of that court. I find myself, however, in entire agreement with the views of Babington L.J. which, if I may respectfully say so, are convincing. In particular I respectfully agree with the learned Lord Justice when he says: "I am satisfied that the Legislature in section 5 was "looking at the taking from the point of view of the "person deprived of his property and endeavouring "to protect him" (3); and: "The mischief aimed "at is the expropriation or confiscation or destruction

(1) [1937] N.I. 103, 123.
(2) [1940] N.I. 133.
(3) Ibid. 157.

" of any property without compensation, and the " section should therefor be liberally construed so as to " give the utmost protection which the language used " will allow." (1).

But the Authority also relies on *France Fenwick v. The King* (2). The decision in that case was summarised by Black L.J., then Attorney-General, in *Benson's* case (3) where his argument is reported as follows: " There is a distinction between taking " property and the mere negative prohibition of its " enjoyment. The taking of property necessarily " implies its transfer as opposed to its being rendered " useless in the hands of the owner " (4). The trial judge in *France Fenwick* (2) and the learned Attorney-General in *Benson's* case (3) were in these passages dealing with the common law, and it is said that such being the common law there has been no taking here only a prohibition. But Mr. McVeigh for the Company has pointed out that this is not a case of a mere negative prohibition, but one of a prohibition, negative no doubt, but coupled with a benefit to the Authority. Therein lies the difference between this case and *France Fenwick* (2) and, if it is necessary to distinguish them, between this case and *Benson's* case (3), because the majority of the court in the Court of Appeal decided the matter on a consideration of section 15 (1) of the 1935 Act. For as I have said that which the Company loses must by virtue of the very statute which causes the loss enure for the benefit of the Authority. In further reference to *France Fenwick* (2) it should be remembered that, as Curran J. commented during the hearing, that was a case in which a direct taking was alleged. If indeed the argument for the Authority as to this point is well founded the Northern Ireland taxpayer might have been saved a very large sum of money in and around 1935 by the simple expedient of a statute prohibiting commercial road motor traffic followed by a statute perhaps a month later giving to the Northern Ireland Road Transport

(1) Ibid. 158.
(2) [1927] 1 K.B. 458.
(3) [1940] N.I. 133.
(4) Ibid. 141.

Board a monopoly of such traffic.

If what the statute has done has not been directly to take the Company's property, it has certainly been to deprive the Company of it and to provide that no person but the Authority shall benefit by that deprivation. If it is not a direct taking can it be anything other than an indirect taking? It is not without interest to notice that when in 1923 the Parliament of Northern Ireland prohibited and merely prohibited the continuation of certain off licences it thought right to provide that compensation for the resulting loss should be paid from a fund, contributed to in full by those who presumably would benefit from the prohibition.

The answer to the suggestion that "taking" only means a complete taking is the observation of Curran J. during the argument that if you take off a man's limbs one by one his only claim, if he had any at all, would be in respect of the last limb removed, for until then he would not be a limbless man, and so if piece by piece this Company were to lose all its business it could claim compensation only when the last piece had gone, and then only for the value of that piece.

We were told that if property has the meaning contended for by the Company, that it includes something more than what is tangible, the Parliament of Northern Ireland is robbed of all practical powers of legislation, and the Diseases of Animals (Poultry) Act (Northern Ireland), 1948, and the Rent Acts were mentioned. Section 4 of the former is quite general and is for the general good, including that of the intending importer, while section 5 which deprives an owner of poultry of his birds provides for compensation, though he has been deprived of them only for the purpose of their slaughter and not for the benefit of anyone who could be said to have taken them. The Rent Acts did not destroy a landlord's rights. They did not provide that a tenant should occupy a house rent free. They suspended his right to get possession, insisting that he keep his bargain so long as the tenant kept his. In any event we are here concerned only with one section of the statute.

Since writing this judgment I have read the judgment

of Curran J. While adhering to my opinion that goodwill is property which may be and in this case has been taken in contravention of section 5 (1) of the Government of Ireland Act, 1920, I wish to add that I entirely agree with his judgment that a right to exercise a lawful trade is property and that the effect of the impugned section has been to take such property without compensation.

For all these reasons I am of opinion that the effect of the impugned section of the Transport Act (Northern Ireland), 1948 is to take the Company's property without compensation, and to that extent it is void as contravening section 5 (1) of the Government of Ireland Act, 1920 and that the case should be remitted to the learned resident magistrate to proceed according to the law as here laid down.

CURRAN J.: The appellants have carried on the business of furniture removers and storers since 1898. They have built up a substantial business and have continued up the present to make substantial profits, in spite of the competition of the Northern Ireland Road Transport Board, and its successor the Ulster Transport Authority. Their business had not been affected by the provisions of the Road and Railway Transport Act (Northern Ireland), 1935, apart from the fact that by that statute the Northern Ireland Road Transport Board was created and became a competitor in the furniture removing and storing business. By sections 18 (1) and 19 (1) (*d*) of the Transport Act (Northern Ireland), 1948, however, it was provided as follows: [His Lordship read sections 18 (1) and 19 (1) and then continued]:

The appellants have been convicted for using a motor vehicle on the public highway to carry for reward merchandise contrary to the said section 18 (1). It is not disputed that the appellants did contravene the section and that they were properly convicted if the said section is intra vires the Parliament of Northern Ireland. The appellants, contend however, that the section is ultra vires by reason of the provisions of

section 5 (1) of the Government of Ireland Act, 1920, in that it has the effect of taking property from the appellant without compensation. The learned resident magistrate has found that if the prohibition contained in the said section is legally enforceable the appellants would lose important and substantial business connections and work arising therefrom and goodwill, and its furniture removal business would be seriously and adversely affected; and that the respondents intend, if possible, to acquire a monopoly in furniture removal work by taking advantage of the provisions of the said section. In other words, as I read his findings, and, indeed, as I read the provisions of the section, the business lost to the appellants will be diverted to the respondents. The learned resident magistrate has decided that (*a*) the business and (*b*) the goodwill of which the said section 18 (1) purports to deprive the appellants is not "property" within the meaning of section 5 of the Government of Ireland Act, 1920; and that, in any event, there has not been a "taking" within the meaning of that section; and, accordingly, that section 18 (1) of the Transport Act (Northern Ireland), 1948, is intra vires the Parliament of Northern Ireland. This court has to determine whether the learned resident magistrate was right in so deciding.

I propose to consider the relevant provisions of the Government of Ireland Act, 1920; and then to examine the provisions of section 18 (1) of the Transport Act (Northern Ireland), 1948, together with the provisions of section 19 (1) (*d*) of the same Act.

[His Lordship read sections 4 (1) and 5 (1) of the Government of Ireland Act, 1920 and then continued]:

As I read these sections, a law made by the Parliament of Northern Ireland may be within its legislative powers under section 4 (1); but if it has the effect of taking a person's property without compensation it is ultra vires by reason of the provisions of section 5 (1). So far as the present case is concerned I am not satisfied that the "pith and substance" argument put forward on behalf of the Northern Ireland Road Transport

Board in *Benson's* case (1) has any relevance. I do not exclude the possibility that a case may arise, however, under section 5 (1) in which such an argument may have to be considered.

The prohibition contained in section 5 (1) is in very wide terms. A law cannot be made by the Parliament of Northern Ireland the *effect* of which is either *directly or indirectly* to take *any* property without compensation. The contentions as to what is meant by " property " have ranged from the suggestion that by analogy to the Land Clauses Consolidation Act, 1845, it refers only to land, to the suggestion that it includes any right in the nature of property. I am of opinion that the words *any property* must be given a wide meaning, and, if on examination, it is found that something which the law recognizes as property has been taken from the appellants without compensation by reason of the provisions of section 18 (1) of the Transport Act (Northern Ireland), 1948, such a finding must result, in my opinion, in the decision that the section is ultra vires. The contentions as to what is meant by " take " in section 5 (1) have also covered a wide field. The appellants contend that the intention of the Legislature is to protect the subject from confiscation in any form, and they emphasise the words " *directly* " *or indirectly* " contained in the section. The respondents, on the other hand, contend that *take* implies a transfer and that a mere negative prohibition, which prevents a person from using his property as he lawfully did prior to the prohibition, does not amount to a *taking*.

It will be noted that in section 5 (1) in dealing with the fabric of cathedral churches and other property of religious denominations the Legislature has used the word *divert* and not the word *take*. I have considerable difficulty in appreciating the significance of this use of different words in the same sub-section. That property may be *diverted* by a *taking* is clear, I think, when one turns to section 64 (1) of the Act in which, after prohibiting, *inter alia*, the diversion of the property of

(1) [1940] N.I. 133.

certain universities, a proviso is inserted that the section will not apply to the *taking* of such property for purposes of public utility upon payment of compensation. Whatever may be the precise meaning of "divert" in section 5 (1), it would appear that it can, though perhaps it may not necessarily, involve a "*taking*" whereas the word *take* must necessarily involve *diverting*. It is interesting to note that property may be *diverted* from a religious denomination (for public utility purposes only) if compensation is provided, whereas property cannot be diverted even for public utility purposes from the universities named in section 64 (1) and even if compensation is provided, unless such diversion involves a *taking*.

If I am right in my opinion that *diverting* property may involve a *taking* and that *taking* must involve *diverting* it follows that property may only be *taken* from religious denominations for public utility purposes and on payment of compensation and, accordingly, that the provision in section 5 (1) prohibiting the direct or indirect taking of any property without compensation does not apply to the property of a religious denomination but applies to any other property.

Assuming that the word *divert* has a wider meaning than the word *take* in section 5 (1), it would appear that the Parliament of Northern Ireland has power to make a law the effect of which is to divert property *from* a person (other than a religious denomination) without compensation, provided such diversion does not involve a *taking*. Thus, to adapt the contention of the respondents, it may be that a mere negative prohibition may divert a person's property from him in the sense that it prevents his making any use of such property, yet such a prohibition may not effect a taking. To enact that a man shall not carry on his established business has the effect of diverting his business from him, but it may be that his tangible assets and his *goodwill*, whilst rendered of no value, are not *taken*. Accordingly, if the only *property* a man has in his business are his tangible assets and his *goodwill*, as

was assumed in *Benson's* case (1), the prohibition against his carrying on his business would be intra vires. It remains to be considered, however, whether goodwill and tangible assets are the only property a man has in relation to his business, or whether a man's right to carry on a business already legally established (as distinct from his right to start a new business) falls within the legal concept of property. As Professor Newark has pointed out in his interesting article on the subject in the Northern Ireland Legal Quarterly (1941), Vol. IV., p. 168, this point was not raised and accordingly was not considered in *Benson's* case (1). In that case the contention was made by the Attorney-General and by counsel for the Board that *taking* implies a *transfer* and that view was accepted by the majority of the Court of Appeal. There was an appeal to the House of Lords which was dismissed on the ground that Benson having been acquitted at petty sessions no appeal lay from that court. There is therefore no decision of the Court of Appeal binding on this court. I treat the views of the members of the Court of Appeal with the greatest respect, but in the circumstances I apprehend that it is my duty in the present case to express my own opinion. I am the more satisfied that this is the right course by reason of the fact that in the present case we are considering a different Act and its application to a different set of circumstances. It will be noted that by section 5 (1) of the Government of Ireland Act, 1920, the question is not whether a law has been made authorising property to be acquired (which implies a transfer) ; it is whether a law has been made which *has the effect* either directly or indirectly of *taking* property. This, no doubt, implies a transfer if, for example, the law in question empowers some authority to take the property, but if a person's property is taken from him and is not transferred to another has not the enactment, nevertheless, had the effect of *taking* his property ? Once you have a *taking* of his property from a person it is my opinion that such *taking* is not made any the less a *taking* by reason of the

(1) [1940] N.I. 133.

fact that the property taken has not been transferred to another. A distinction must be drawn, however, between a taking of his property from a person and the mere rendering valueless of such property in his hands.

In the present case one must ascertain what is the precise effect of section 18 (1) and section 19 (1) (*d*) with regard to the appellants' property. So far as the findings of fact in the case stated indicate, the effect of these two sub-sections is to prohibit furniture removers and storers, including the appellants, from removing and carrying furniture to and from quays, and the premises of furniture dealers, furniture manufacturers, furniture vendors and purchasers, auctioneers, private persons and the furniture removers own premises. This business will be diverted to the Ulster Transport Authority, the only competition (if any) being provided by owners of furniture who may carry same in their own vehicles.

It appears to be the clear intention of the Legislature that the business referred to should be diverted to the Authority. So far as the Authority is concerned it receives the custom of those who formerly took it to the appellants and other furniture removers. It receives no tangible property from such furniture removers, nor does it receive any intangible property. I can find nothing that passes from the furniture removers to the Authority other than the custom of those who own furniture and want it removed and carried. The custom of those who, in the past, were clients of the appellants or who, but for the statutory prohibition, might have become clients of the appellants cannot, in my opinion, be described as property. Accordingly, it is my opinion that sections 18 (1) and 19 (1) (*d*) had not the effect either directly or indirectly of transferring any property of the appellants to the Authority.

There remains, then, the question whether the provisions of the said sub-sections had the effect of taking any property from the appellants though such property was not transferred to the Authority nor to anyone else. In my opinion what has been taken from the appellants is a right which they undoubtedly had,

namely, their right to carry on that part of their business as furniture removers and storers which is diverted from them by the provisions of sections 18 (1) and 19 (1) (*d*).

Whilst it is conceded that at common law a person has a right to exercise any lawful trade as and where he wills, the only authority adduced for the proposition that such a right is in the nature of property are the American cases referred to in the article by Professor Newark, to which I have already referred. In *Dent v. West Virginia* (1), Field J. is reported as saying: "Here "all vocations are open to everyone on like conditions. "The interest, or as it is sometimes termed the 'estate' "in them is often of great value to the possessors and "cannot be arbitrarily taken away from them, any "more than their real or personal property can be "thus taken." And in *Hanker v. New York* (2), Brewer J. is reported as saying: "The right to "practise medicine is a valuable property right."

The suggestion that such a right is in the nature of property does not appear unreasonable to me, and the less so when I find in *Rose v. Ford* (3), that Lord Atkin, (with whom Lord Thankerton concurred), Lord Russell, Lord Wright and Lord Roche appear to have been prepared to consider the proposition that a man has a personal right in the nature of property in his life. Thus Lord Atkin says: "It does not seem to me "necessary to say that a man has a personal right of "the nature of property in his life, so that when it is "diminished he loses something in the nature of "valuable property. I do not say that this is not "so" (4), Lord Russell says: "I am of opinion that "if a person's expectation of life is curtailed he is "necessarily deprived of something of value"(5). Lord Wright said: "I accept here the statement of "Parke B. in *Armsworth v. South Eastern Rly. Co.* (6) "used perhaps in a somewhat different context, that a "man has a legal right in his own life. I think he has a

(1) [1889] 129 U.S. 144.
(2) [1898] 170 U.S. 189.
(3) [1937] A.C. 826.
(4) Ibid. 834.
(5) Ibid. 839.
(6) (1847) 11 Jur. 758.

" legal interest entitling him to complain if the in-
" tegrity of his life is impaired by tortious acts not only
" in regard to pain, suffering and disability, but in
" regard to the continuance of life for its normal
" expectancy. A man has a legal right that his life
" should not be shortened by the tortious act of
" another. His normal expectancy of life is a thing of
" temporal value, so that its impairment is something
" for which damages should be given " (1). Lord
Roche : " I regard impaired health and vitality not
" merely as a cause of pain and suffering but as a loss
" of a good thing in itself. Loss of expectation of life
" is a form in which impaired health and vitality may
" express themselves as a result. In such a loss there
" is a loss of temporal good capable of evaluation in
" money though the evaluation is difficult " (2). In
Chant v. Read (3), Hallett J. held that the loss of
expectation of life was not " property " within the
meaning of that word in the Married Women's Property
Act, 1882, section 12, as amended. I do not find in
that case, however, that the general propositions
referred to have been affected.

The appellants had devoted skill and energy in the exercise and development of their trade. In the continued exercise of their right to trade they had acquired experience and no doubt greater knowledge and skill in their particular type of business. They had built up in this way something of value based upon and dependent upon the continuance of their right to carry on their trade. Their right to trade had become more valuable by reason of their enhanced experience, knowledge and skill. Take away their right to trade and you take away its accumulated value. Is this not a personal right in the nature of property ? By taking that right from the appellants has not the Legislature taken from the appellants valuable property ? In my opinion the answer to both these questions is in the affirmative.

I do not propose to explore the possible difficulties that may arise from a wide interpretation of the words

(1) [1937] A.C. at 847.
(2) Ibid. 859.
(3) [1939] 2 All E.R. 286.

take " any property " in section 5 (1) of the Government of Ireland Act. As I have indicated earlier in this judgment, it may be that cases can arise under section 5 (1) of the 1920 Act that will pose even more difficult questions than in the present case and in which, for example, the issue of pith and substance may have to be considered. It may even be necessary to seek, if such cases arise, an extension of the powers of the Parliament of Northern Ireland or a clarifying enactment of the Parliament at Westminster. The court must interpret an Act of Parliament as it finds it and in the light of the relevant circumstances. On the facts before me the Parliament of Northern Ireland had no power to enact section 18 (1) of the 1948 Act without providing for payment of compensation to the appellants and other furniture removers and storers in like case. I would have preferred to have limited this decision to section 19 (1) (*d*) of the 1948 Act but of course it is intra vires so far as it goes as it is solely concerned to prevent the prohibition contained in section 18 (1) from affecting part of the business of removers and storers of furniture.

In my opinion the answer to the question put in the case stated should be as follows : The learned resident magistrate was wrong in law in holding that section 18 (1) of the 1948 Act is intra vires. I accordingly agree that the case should be remitted to the learned resident magistrate to proceed according to the law as declared by this court.

Appeal allowed, case remitted.

The Authority appealed to the Court of Appeal.

Nicholson Q.C., Harrison Q.C. and *Gibson* for the Authority.

McVeigh Q.C., Jones Q.C. and *MacDermott* for the respondents.

Cur. adv. vult.

LORD MACDERMOTT L.C.J. : On October 22, 1951, James Brown & Sons (Belfast) Ltd. of 300 Newtownards

Road, Belfast (hereinafter referred to as "the respondents") were convicted and fined by the Resident Magistrate for the County of Tyrone on the hearing of a complaint that they, on April 20, 1951, at Coalisland in the said county, "being persons other than "the Ulster Transport Authority, and without the "consent in writing of the Authority, and without "the approval of the Ministry of Commerce for "Northern Ireland, did use a motor vehicle on the "public highway to carry for reward merchandise, "contrary to section 18 (1) of The Transport Act "(Northern Ireland), 1948." This Act is an Act of the Parliament of Northern Ireland, and the defence made by the respondents before the resident magistrate and since was based solely on the submission that section 18 (1) thereof is ultra vires that Parliament. The respondents appealed against this conviction by way of a case stated and the case, after a remit for amendment, came before the Divisional Court (Sheil and Curran JJ.) which, by order dated the 22nd January, 1953, held, inter alia, that section 18 (1) of the said Act (hereinafter referred to as "the Act of 1948") is ultra vires. From this decision the Ulster Transport Authority (hereinafter referred to as "the appellants") now appeal pursuant to the provisions of section 50 of the Government of Ireland Act, 1920, and paragraph 6 of the First Schedule to the Irish Free State (Consequential Provisions) Act, 1922.

The respondents have been engaged in the business of furniture removal and storage since 1898, their place of business being at all material times in Belfast. This business is substantial and profitable and involves the removal and carriage of furniture throughout Northern Ireland by road motor vehicles. Such being the nature of the business concerned in these proceedings, it will be convenient before coming to the facts of the respondents' prosecution to consider the material aspects of the transport legislation passed by the Parliament of Northern Ireland, commencing with the Road and Railway Transport Act (Northern Ireland), 1935 (hereinafter referred to as "the Act of "1935).

The main object of that Act was to transfer various road transport undertakings to a public authority established by the Act and called the Northern Ireland Road Transport Board. Section 4 declared that it should be the duty of the Board to secure, in conjunction with the railway companies, the provision of a properly co-ordinated system of transport giving efficient, economical and convenient transport services to the public. Section 5 provided that the Board should, subject to certain exceptions, acquire every road motor undertaking operated for hire or reward in Northern Ireland; and the exceptions specified included any road motor undertaking carried on immediately before the passing of the Act of 1935 for a purpose which was excepted from the provisions of section 15 by sub-section (4) of that section. Section 5 also enacted what I may refer to comprehensively as the machinery of acquisition whereby the undertakings to be acquired would be transferred to and vested in the Board. Section 6 made provision for the payment of consideration by the Board to the owners of the transferred undertakings and for the determination thereof by arbitration in default of agreement. Section 15 (1) prohibited a person other than the Board from using a motor vehicle on the public highway for hire or reward except with the consent in writing of the Board and the approval of the Ministry of Home Affairs. But section 15 (4), to which reference has already been made, excepted from the terms of this prohibition certain categories of user, amongst them (paragraph (*e*) (iii)) the use of a motor vehicle for the collection or delivery of merchandise by a person " where the merchandise consists of furniture collected or delivered by such person in connection with his business as a remover or storer of furniture."

While the broad effect of the Act of 1935, therefore, was to bring about a general transfer of road motor undertakings to the Board, with payment of consideration or compensation to the dispossessed owners, and to protect the Board in the enjoyment of what they had acquired by forbidding others to compete,

those who, like the respondents, carried on the business of removing and storing furniture were not touched respecting it. That kind of undertaking was not the subject of compulsory acquisition under the Act; it remained in private hands as before and the terms of section 15 (4) (*e*) (iii) were wide enough to ensure that it could be carried on without restriction and as freely as before. This is not to say that the Act of 1935 had no effect upon those engaging in the business of furniture removing. The operating powers of the Board were conferred in wide terms and it cannot be doubted that furniture removing was amongst them. The Act, therefore, made it possible for the Board to compete with the private undertakers in this sphere, but apart from that it left them as they were.

The Act of 1948 carried the amalgamation of transport undertakings in Northern Ireland a stage further. It constituted the appellants a public authority and empowered them to carry on the activities previously carried on by the Board or by any railway or other transport undertaking transferred to them under or by virtue of its provisions. It provided for the vesting in the appellants of the Board's undertaking and for the dissolution of the Board and conferred upon the appellants running and other powers no less ample than those which the Board had enjoyed. It made no provision for the transfer or vesting of any road motor undertakings which had not been subject to the compulsory provisions of the Act of 1935, and by section 75 it repealed all the provisions of that Act of which mention has been made, subject to a saving in respect of the completion of the vesting of any transport undertaking which the Board had been empowered to acquire under section 5 of the earlier enactment.

Sections 18 and 19 of the Act of 1948 fulfil a function similar to that of the repealed section 15 of the Act of 1935. Section 18 (1) reads:

> "Save as provided by the next succeeding section "of this Act, a person other than the Authority "shall not, except with the consent in writing of "the Authority and the approval of the Ministry "use a motor vehicle on a public highway to carry

" for reward any passengers or any luggage or " merchandise. A consent required for the purposes " of this section may be granted for such period and " subject to such conditions as the Authority, with " the approval of the Ministry, may determine."

Section 19 provides for exemptions from the restrictions imposed by section 18. The material part of section 19 is sub-section (1) (*d*) which reads as follows :

" (1) The provisions of the last preceding section " shall not apply to or affect—

" (*d*) the use, by a person who carries on, from a " principal place of business in Northern " Ireland, the business of a remover or storer " of furniture, of a motor vehicle to move " furniture or effects, not being part of the " stock in trade of the owner thereof, from or " to premises occupied by such owner to or " from other premises occupied by such owner " or to or from a store."

The difference between this provision and that made by section 15 (4) (*e*) (iii) of the Act of 1935 will be noted. The latter covered the whole carrying business of a remover or storer of furniture. The provision of the Act of 1948 is much narrower, the effect of section 18 (1) thereof being to prohibit the use by a remover or storer of furniture of a motor vehicle for moving furniture or effects which are part of the stock in trade of the owner thereof, or for moving furniture or effects from premises (other than a store) not occupied by the owner, or to premises (other than a store) not occupied by such owner. In short, the furniture remover or storer remains free to use a motor vehicle for what was described in the course of the argument as " flitting ", by which was meant the moving of the belongings of an owner from one dwelling of his to another or from his dwelling to store or vice versa ; but all else is forbidden unless the appellants consent and the Ministry of Commerce approves. I shall refer, for brevity, to the prohibition thus enacted as " the relevant pro- " hibition." And, in order to dispose of the point, I may add here that the provision as to consent and

approval has, in my opinion, no material bearing on the matters raised by this appeal. If the relevant prohibition would otherwise offend as being ultra vires the Parliament of Northern Ireland, it is not to be redeemed by a dispensing power committed to the unfettered discretion of a Ministry or, a fortiori, of a trade competitor. In *James v. Cowan* (1) Lord Atkin said: "The Constitution is not to be mocked by "substituting executive for legislative interference "with freedom." This dictum was directed to a different situation, but the underlying principle is the same. The limits of legislative power can no more be evaded by authorising someone to avert at his pleasure the consequence of what transgresses in the statute itself than they can by leaving the doing of what is forbidden to someone's discretion.

The undisputed facts of the prosecution out of which this appeal arises furnish a good example of the kind of activity which was thus prohibited, for the first time, by the Act of 1948. On April 19, 1951, Arthur Patrick McGrath, a furniture dealer carrying on business at Coalisland, County Tyrone, purchased a quantity of furniture for the purpose of his business at an auction held by Messrs. John Ross & Co. at their auction mart in the City of Belfast. On the next day this furniture was, without the consent of the appellants or the approval of the said Ministry, removed by the respondents' road motor vehicle from the said auction mart to the purchaser's premises in Coalisland. This work was done for reward and on the order of the auctioneers, Messrs. John Ross & Co. The furniture was part of the stock in trade of Arthur Patrick McGrath and the transaction was clearly and admittedly outside the exception provided for by section 19 (1) (*d*).

I shall have to make further reference to the findings of fact, but, having described the nature of the transaction alleged to constitute the offence charged, it will be well to mention now the provisions of the Government of Ireland Act, 1920, relied upon by the respond-

(1) [1932] A.C. 542, 558.

ents and to state the conclusions which led the learned resident magistrate to a conviction.

It was not disputed that legislation in respect of transport in Northern Ireland comes within the power to make laws for the peace, order, and good government of Northern Ireland conferred by section 4 of the Act of 1920. The contention of the respondents was based entirely on the restrictive provisions of section 5 (1) of that Act, and in particular on the following words taken from the beginning and end of that sub-section :

> " In the exercise of their power to make laws " under this Act neither the Parliament of Southern " Ireland nor the Parliament of Northern Ireland " shall make a law so as either directly or indirectly " to . . . take any property without compensation."

Section 18 (1) of the Act of 1948 must, according to its terms, be read with section 19, and what the respondents submitted was, in effect, that section 18 (1) when read with section 19 (1) (*d*) offended against section 5 (1) of the Act of 1920, and was therefore void to that extent, because in thus enacting the Parliament of Northern Ireland had made " a law so "as, either directly or indirectly . . . . to take " property of theirs without compensation.

The conclusions of the resident magistrate are set out in paragraph 3 of the case stated under four heads as follows :

(i) that the business of which section 18 (1) of the 1948 Act purports to deprive the appellant (the present respondents) is not property within the meaning of section 5 of the Government of Ireland Act, 1920.

(ii) that goodwill is not property within the meaning of section 5 of the Government of Ireland Act, 1920.

(iii) that there was no " taking " within section 5 of the Government of Ireland Act, 1920.

(iv) that section 18 (1) of the 1948 Act is not ultra vires.

The issue to be determined, therefore, involves not

only the meaning of the material words of section 5 (1) of the Act of 1920 but the effect, as well as the meaning, of the impugned enactment.

The provisions of section 5 (1) which immediately precede the final words of the sub-section quoted above forbid the diversion from any religious denomination of the fabric of cathedral churches or, except for certain specific purposes of a public nature and upon the payment of compensation, of "any other property." The question whether the subsequent words relied upon by the respondents—"or any property without compensation"—refer to the property of a religious denomination or to property generally was raised, but not argued, by counsel for the appellants. They did not concede the wider interpretation, but agreed that the decision in *O'Neill v. Northern Ireland Road Transport Board* (1), was against them on the point. In that case this court held that these words were not limited by the context and should be read as referring to property generally. If I may respectfully say so, I find no difficulty about adopting that view. But that is by the way; it was clearly part of the ratio decidendi of the case and is therefore binding upon us.

The question, then, is whether the impugned provisions of the Act of 1948 were such as to "take any "property" of the respondents contrary to section 5 (1) of the Act of 1920. In considering the ambit of this expression one must, of course, construe its words in association, but, bearing this in mind, it will be convenient to commence the enquiry by asking whether, on the facts as found and assuming the relevant prohibition to be valid and obeyed, the respondents would lose "property" as that word is employed in section 5 (1)? That they would lose something, and something of value, seems to me to admit of no denial having regard to the findings of the resident magistrate. Heretofore the respondents have been doing all kinds of furniture removal work, including not only removals for private persons but removals to and from the quays and to and from the premises of furniture dealers, furniture manufacturers and auctioneers. Further,

(1) [1938] N.I. 104.

it is found that the effect of the relevant prohibition would be to cause the respondents to lose a substantial amount of this business. In addition to losing the work of the firm of Messrs. John Ross & Co., the auctioneers, they would, from that cause alone, " lose " important and substantial business connections and " work arising therefrom and goodwill " and their " furniture removal business would be seriously and " adversely affected." It is also found that there is " very substantial goodwill " attaching to the respondents' furniture removal business and that this goodwill, at the time of the passing of the Act of 1948, " applied to the carriage of furniture in the manner objected to in these proceedings." In short, if the impugned provisions of sections 18 and 19 of the Act of 1948 are operative the respondents, as I read the findings of the case, will, over and above such consequential damage as may be inflicted on that part of their undertaking which they remain free to carry on, lose completely—(i) the portion of their furniture removal business struck at by these provisions, and (ii) the goodwill which exists in respect of that portion.

But does that loss constitute or include a loss of " property ? " In considering that question I do not think any significant distinction is to be drawn between the two elements I have enumerated. " Goodwill " is a word sometimes used to indicate a ready formed connection of customers whose custom is of value because it is likely to continue. But in its commercial sense the word may connote much more than this. It is, as Lord Macnaghten observed in *Inland Revenue Commissioners v. Muller & Co.'s Margarine Ltd* (1), " the attractive force which brings in custom," and it may reside, not only in trade connections, but in many other quarters, such as particular premises, long experience in some specialised sphere, or the good repute associated with a name or mark. It is something generated by effort that adds to the value of the business. When the make-up of a well-established, profitable enterprise providing a special service (such

(1) [1901] A.C. 217, 224.

as the respondents' furniture removing service) is examined I think it well-nigh impossible to disentangle the business that has been built up from its goodwill or to give the latter a single or precise meaning. I therefore approach the question under consideration on the basis that here the relevant loss is really a loss of goodwill in the commercial sense and as described by Lord Macnaghten in *Muller & Co.'s* case (1).

Now, in that case the House of Lords held that goodwill was " property " within the meaning of section 59 (1) of the Stamp Act, 1891, and it is clear that this conclusion was reached, not by ascribing any special or restricted meaning to " property " but by treating it as used in its wide and popular signification. If the word is similarly used in section 5 (1) of the Act of 1920 it must, in my opinion, include the respondents' loss of goodwill. I did not understand the appellants to dispute this, but they contended that section 5 (1) only referred to tangible property and therefore had nothing to say to a taking of goodwill by itself. This was founded upon a reading of " property " ejusdem generis with the fabric of cathedral churches and the other property capable of being used for works of public utility which are mentioned in the preceding portion of the text. A similar submission failed in *Muller & Co.'s* case (1), and this present contention seems to me to have nothing more to be said for it. If " property " is not to be restricted by the context to what is owned by religious bodies it would be strange, if for no more cogent reason, it had to bear a limited meaning which would exclude many forms of property no less valuable because they are intangible. In my opinion, the Divisional Court was right in rejecting this argument and I accordingly conclude that the effect of the challenged legislation, if valid, would be to make the respondents lose " property " within the meaning of section 5 (1). Curran J. arrived at this conclusion by a somewhat different path. As I read his judgment his view was that the property lost was not so much goodwill as the right to exercise a lawful trade which, on the strength of certain United

(1) [1901] A.C. 217, 224.

States authorities, he considered to be in the nature of property. No doubt, most kinds of property may, in the final analysis, be said to consist of a bundle of rights, but the term is not necessarily synonymous with a right no matter how fundamental and valuable that right may be, and I do not wish to be taken at acquiescing in the view that the right to exercise a lawful trade comes within the common meaning of property and therefore within that word as it is used in section 5 (1). I express no concluded opinion on the matter one way or the other. I prefer to say, with Sheil J., that the loss is a loss of property because it is or includes a loss of goodwill.

The next question is whether the effect of the relevant prohibition is " to take " the property thus lost. This verb was the subject of much argument, most of it referable to two submissions advanced on behalf of the appellants as follows: (1) " to take " means to acquire or take over and thus signifies a transfer or passing of property from one to another, in contra-distinction to a taking away without acquisition, as by dissipation or destruction; and (2) a mere prohibition is not a taking whatever else " to take " may connote. These submissions are related, but it will be convenient to consider them in the order stated.

The first was accepted by the majority constituting this court (Andrews L.C.J. and Murphy L.J.) in *Northern Ireland Road Transport Board v. Benson* (1). Babington L.J. was of the contrary opinion and his view commended itself in this case to Sheil J. who considered—as I think rightly—that the decision of this Court in *Benson's* case (1) was not binding as it was held by the House of Lords to have been pronounced without jurisdiction : see *Benson v. Northern Ireland Road Transport Board* (2). As at present advised I find the judgment of Babington L.J. more persuasive than the judgments of the other members of the court on this point; but on the view I take of the findings and of the material enactments it is

(1) [1940] N.I. 133. (2) [1942] A.C. 520.

unnecessary to reach a decision on the question and I therefore refrain from doing so. I am of the opinion that even on the argument of the appellants the respondents' property would be taken contrary to section 5 (1). I think it would be taken over and not just taken away, and I think this would not only be the effect but would also be in accordance with the intention of the impugned legislation. Now if that is right - and I shall say why I think it is right in a moment— then, although the Parliament of Northern Ireland has said nothing in plain terms about the acquisition of any part of any furniture remover's business, section 5 would undoubtedly be contravened because it forbids a taking by indirect as well as by direct means and therefore strikes at any legislative device designed and sufficient to achieve acquisition without compensation though not purporting to do so.

A colourable device of this nature ought not to be ascribed readily to the Legislature, but when the nature of the relevant legislation and of its consequences, as illustrated by the findings in the case, are considered I can see no escape from the conclusions I have mentioned. So far as the statute book is concerned one has first a general acquisition of road motor undertakings on payment of compensation for intangible as well as tangible assets (as the Second Schedule to the Act of 1935 shows). But the undertakings of furniture removers and storers are excepted and the owners are left free to ply their trade. Then, with no further provision as to acquisition with compensation, these owners are forbidden to carry on a substantial part of their business. What is the reason for this change? It cannot lie in the unforeseen consequence of some inadvertent omission or unrecognised slip. The divergence between section 15 (4) (*e*) (iii) of the Act of 1935 and section 19 (1) (*d*) of the Act of 1948 is unmistakably deliberate and intentional. But what was the intention? Parliament must be presumed to intend the necessary effect of its enactments, and the answer to this question cannot overlook the fact that in this specialised field—and here the facts are very different from those of *Benson's* case (1)—the natural

(1) [1940] N.I. 133.

consequence of the enforcement of the relevant prohibition would be to divert to the appellants the business, or at least the substantial part of the business, which their erstwhile competitors were no longer allowed to transact. The transfer might not be 100 per cent., but few people can manage more than small lifts for themselves and it is hard to see where the bulk of the business could legitimately go if it did not pass to the appellants. Nor could the appellants well stand aloof from such business, if there was no one else to do it, having regard to the nature of their duty to provide for the needs of the public as imposed by section 5 of the Act of 1948. I think, therefore, that the legislation and the nature of its subject matter justify the answer that the intention was to enable the appellants to capture the prohibited business, and to do so without expense. I can find no other intention which offers a more likely explanation of the provisions in question ; and counsel for the appellants, when invited to suggest some other view which would fit the circumstances as well or better were unable to advance an alternative.

The findings of fact must now be examined for any light they may throw on the purpose as well as the effect of this legislation. Those relating to the loss which would be caused to the respondents have already been referred to and need not be mentioned again. But the following additional findings must be noted. Except for the references to the parties which I have altered to accord with the descriptions employed in this judgment, I give these findings as they appear in the case :

(10) If the respondents are prohibited by the operation of the 1948 Act from carrying furniture to or from the premises of Messrs. John Ross & Co., the appellants will have to be employed to do the said work or any part thereof which the respondents may be prevented from doing.

(13) The appellants do all kinds of furniture removal work and have been doing so since their creation by the 1948 Act, since when they have been in active competition with the respondents. Prior

to the passing of the 1948 Act the appellants' predecessor the Northern Ireland Road Transport Board carried on all kinds of furniture removal work since its creation by the Road and Railway Transport Act (Northern Ireland), 1935.

(14) The appellants, taking advantage of the provisions of the 1948 Act, wish, and intend if possible, to acquire a monopoly in furniture removal work.

(16) There is no person or body other than the appellants legally entitled, under the provisions of the 1948 Act, to perform that part of the business of the respondents which the 1948 Act purports to prohibit the respondents from performing.

In my opinion these findings show that the relevant prohibition will have the effect which, according to the view I have expressed, was intended and they therefore support that view. In referring to finding (14) I do not, of course, mean to suggest that the intention of the appellants necessarily reflects that of the Legislature. The relevance of that finding, as I see it, lies in this that it goes to show that the scheme of the challenged legislation was such as to offer the appellants a ready and practical means of acquiring the respondents' goodwill without paying for it.

I should add, before going further, that I see no reason to speculate upon the motives of the Legislature in enacting this particular piece of leglisation. Whatever in fact those motives may have been, the intention of the Legislature, as gleaned from its terms, is what must guide the court in this instance.

The second of the submissions on the meaning of "to take" was founded partly on the judgment of Wright J. (as he then was) in *France Fenwick & Co. v. The King* (1), and partly on the application of that judgment by the majority of this court in *Benson's* case (2) to the requirements of section 5 (1) of the Act of 1920. The proposition thus advanced may be stated shortly as follows: "A mere negative pro-"hibition, though it involves interference with an "owner's enjoyment of property, does not amount to "a taking of that property within the meaning of

(1) [1927] 1 K.B. 458.

"section 5." In *Benson's* case (1) Andrews L.C.J. seems to have accepted this proposition without reservation for he says: "There is in my judgment a "fundamental and well recognised distinction between "taking or authorising property to be taken without "paying compensation, this involving an actual use "or taking of property into possession, and a negative "or restrictive provision which merely involves inter- "ference with the owner's enjoyment of property." (2) But Murphy L.J. spoke more guardedly and, as I read his judgment, was at some pains not to get too far away from the facts of *Benson's* case (2).

The argument on this aspect of the case had much to say about the "pith and substance" principle and its corollary, the doctrine of incidental effect, as enunciated in *Gallagher v. Lynn* (3). On one hand, it was said that the test of the applicability of section 5 of the Act of 1920 is entirely one of the consequence or effect of the challenged statute. Pith and substance might be material if the issue arose on section 4, but section 5 simply forbids the making of a law with certain specified results—"so as either directly or indirectly "to . . . ." etc. Accordingly, if the effect of the relevant prohibition was to take the respondents' property without compensation, it transgressed and is void. The rival contention, on the other hand, did not admit any such marked contrast between sections 4 and 5. Pith and substance could arise as a test in both. "Directly or indirectly" pointed to different ways of achieving an avowed purpose rather than to immediate and more remote effect. The key lay in the true character of the enactment and if the effect of a mere prohibition was to injure or destroy the enjoyment of property this could be incidental and did not necessarily conclude the question. If consequence were the sole criterion, would the Legislature be competent to make the possession of lethal weapons an offence or even to make provision for the fining of offenders? A construction which might cripple the

(1) [1940] N.I. 133.
(2) Ibid. 145.
(3) [1937] A.C. 863.

legislative power should, it was said, be avoided if a reasonable alternative offered.

This argument furnishes another example of the kind of problem which may arise whenever legislative power is conferred subject to some overriding restriction. The numerous decisions of the Australian High Court on the effect of section 92 of the Commonwealth Constitution, the views of the Judicial Committee on the same enactment in *Commonwealth of Australia v. Bank of New South Wales* (1), and the recent decision in *Govindan Sellappah Nayar Kodakan Pillai v. Punchi Banda Mudanayake* (2), on section 29 of the Constitution of Ceylon, though addressed to enactments which have no exact counterpart here, all go to show that the difficulties of the constitutional questions produced by legislation of this nature may be no less than their importance.

In the present case, however, I do not think this court is called upon to choose between the views propounded or to find a solution of the problem in some other direction. As already indicated, the submission under examination is closely related to that first considered on the meaning of " to take," and the reason why neither calls for a definite ruling in this case is really the same. We are not dealing here with a " mere " prohibition or with a prohibition which is essentially regulatory in character. We are dealing with what I have held to be, according to the intention of the Legislature, a device for diverting a definite part of the business of furniture removers and storers from the respondents and others to the appellants. If that is right, the result must be the same whether section 5 (1) of the Act of 1920 sounds in pith and substance or in effect or partly in one and partly in the other. Wherever else a prohibition directed to other ends might lead, the relevant prohibition cannot but constitute a taking if my views as to its effect and underlying intention are correct.

For these reasons, I am of the opinion that there has been a taking of property within the meaning of section 5 (1).

(1) [1950] A.C. 235. (2) [1953] 2 W.L.R. 1142.

The next question is whether there has been a taking of property "without compensation." There clearly has been such a taking in one sense because, as mentioned earlier, the Act of 1948 says nothing about compensation. The appellants, however, contended that if the effect of the impugned provisions had been to take the respondents' property this would not amount to a taking without compensation because, (*a*) the Act of 1948 did nothing to forbid or exclude the payment of compensation, and (*b*) a subject whose property is taken from him has, in the absence of unequivocal statutory provision to the contrary effect, a right at common law to have compensation for his loss assessed in the High Court. In support of (*b*) they cited *Attorney-General v. De Keyser's Royal Hotel* (1), and relied particularly on Lord Atkinson's observations in *Central Control Board (Liquor Traffic) v. Cannon Brewery Co., Ltd.* (2). This contention must, in my opinion, fail. I express no view as to the proposition of law stated at (*b*) except to remark that if well founded, it has, to judge by the reports, been resorted to surprisingly little. But, however sound, it cannot validate an enactment in a manner at variance with the intent of that enactment. If, as I am satisfied, the object here was to capture the prohibited business for the appellants without compensating the owners, there is no way of changing that intent in order to protect the legislation. One cannot seek to circumvent the provisions of section 5 (1) and then throw over the very purpose of such a manoeuvre when it has failed.

I am, accordingly, of opinion that the relevant prohibition has the intended effect of taking property without compensation so as to contravene the material provisions of section 5 (1) of the Act of 1920.

The Divisional Court, coming to the same conclusion, held section 18 (1) of the Act of 1948 to be ultra vires and did not attempt to qualify or restrict the consequences of this ruling. It remains to consider whether this was right. Realising that, if section 18

(1) [1920] A.C. 508. (2) [1919] A.C. 744, 752.

(1) were declared altogether void, the entire provisions of sections 18 and 19 would fall out of the Act of 1948 and leave them unprotected from competition not only in the limited field to which this case relates, but also as respects the wide franchise which the Board acquired on payment of compensation, the appellants submitted that an infringement of section 5 (1) of the Act of 1920 need not have this result and that, if the respondents were correct in their contentions, the effect on sections 18 and 19 should be limited so as not to extend beyond what I have called the relevant prohibition.

Section 5 (1) of the Act of 1920 ends by saying that :

" Any law made in contravention of the restrictions " imposed by this sub-section shall, so far as it " contravenes these restrictions, be void."

I am not aware of any authority for the view that language such as this necessarily means that contravention must produce an actual gap in the statute book in the sense that the measure concerned, or some specific part thereof, simply drops out of the authorised text. As well as this vertical severability, if I may so describe it, I see no reason why, if the circumstances warrant such a course, the terms of section 5 (1) should not be sufficiently met by what I may call a horizontal severance, a severance that is which, without excising any of the text, removes from its ambit some particular subject matter, activity or application. This, I think, would give effect to the words " so far as it " contravenes " without impinging on the meaning or weight to be attached to the word " void ". Indeed, when one reads section 6 (2) of the Act of 1920, which provides for a conflict between Northern Ireland and Imperial legislation, it is clear that " void " is there used in a manner compatible with a horizontal severance. This sub-section contains the following provision : " . . . . the Act of the Parliament of Northern " Ireland shall be read subject to the Act of the " Parliament of the United Kingdom, and so far as it is " repugnant to that Act, but no further, shall be " void." Repugnance might only arise in respect of one of several applications or " layers " of subject

matter. For example, an Imperial statute passed, say in 1945, might have enacted that removers and storers of furniture in Northern Ireland should remain as free as theretofore to carry on their business. In that event, the effect of section 6 would not have been to make section 18 (1) altogether void, but only void in so far as by reason of section 19 (1) (*d*) it was repugnant. I cannot see any good ground for holding that a like result would be inconsistent with the terms of section 5 (1).

While I agree with the conclusion of invalidity reached by the court below I would, therefore, vary the form of its order by holding that section 18 (1) of the Act of 1948 is ultra vires in so far as it purports to prohibit the use of a motor vehicle for the collection or delivery of furniture by a person in connection with his business as a remover or storer of furniture.

PORTER L.J. : I agree with the judgment which has just been delivered by the Lord Chief Justice, and I have only a few remarks to add.

It is unnecessary to discuss the effect of sections 18 (1) and 19 (1) (*d*) upon the furniture removal business carried on by the respondents, as the facts are found and very clearly stated in the case. The appellants and also their predecessors, the Transport Board, have been doing furniture removal work in active competition with the respondents and other similar firms, and the appellants wish and intend, if possible, to acquire a monopoly of that work. If the prohibition is valid there would be no person or body other than the appellants legally entitled to carry on that part of the business which the respondents are prevented from carrying on, and accordingly, the appellants would have to be employed to do that work. The appellants may, of course, licence persons to do the work, but it is scarcely to be expected that those who wish and intend to acquire a monopoly would permit any other person or firm to engage in the business. As for the suggestion that the respondents' customers might purchase motor vehicles and do the

work which the respondents are prohibited from doing, that possibility is so remote that it is hardly worth consideration.

The net result, therefore, of the prohibition is that the respondents will be deprived of a profit making portion of their business which would have to be carried on by the appellants.

In order to ascertain what was the intent of the Legislature in enacting the prohibition it is essential to bear in mind the declared object of the Acts of 1935 and 1948, and the powers and duties of the Board and the appellants respectively under those Acts. The appellants, who succeeded to all the property, powers, rights and duties of the Board, are bound to provide an efficient, economical, convenient and properly integrated system of transport in order to meet the needs of the public, agriculture, commerce and industry. To meet its obligations the Board was empowered by the Act of 1935 to purchase a large number of road transport undertakings, but there was excepted (inter alia) the use of a motor vehicle for the collection or delivery of furniture by a person in connection with his business as a remover or a storer of furniture.

The result was that the respondents and other firms who had been carrying on the business of furniture removal and storage found themselves confronted with a new and powerful rival established and supported by Parliament, but there is no evidence in the case stated that the appellants have been successful in capturing any considerable part of the business of the respondents or the other firms who carry on the collection and delivery of furniture. What then was the intention of the Legislature in enacting this extraordinary prohibition in the Act of 1948? If it was in pursuance of the policy of integrating the system of transport that the respondents were to be deprived of their right to carry on this portion of their business, why should they be treated differently from those whose undertakings had been acquired by the Transport Board under the 1935 Act? The respondents had been engaged in a lawful business. Why should they be punished by being deprived of that business? Were

they incompetent or negligent? Was their service unsatisfactory? Were their charges exorbitant? No such allegations were made, nor was it suggested that it was necessary or expedient that the prohibited portion of the furniture removal business should be extinguished as being against public policy. The only inference that can be drawn from these considerations is that the prohibition was devised and enacted for the purpose of enabling the appellants to capture that portion of the rival business which the respondents were prohibited from carrying on.

That is the true nature and character, the pith and substance of this piece of legislation, and it was to prevent unjust legislation of this kind that by section 5 of the Government of Ireland Act, 1920, Parliament was prohibited from making a law so as directly or indirectly to take any property without compensation.

Counsel for the appellants relied upon the decision of Wright J. in *France Fenwick & Co. v. The King* (1), as shewing that a mere prohibition is not a taking of property without compensation. That was a case in which it was contended that an order given by a Customs Officer to the captain of a ship that "in no "circumstances was the ship to discharge her cargo "without permission" amounted to a requisitioning of the ship by the Government. Wright J. was there contrasting a mere negative prohibition with a requisitioning "where" as he said "property is actually taken "possession of or used by the Government or where "by the order of a competent authority it is placed at "the disposal of the Government."

I do not think that his words have any application to the present case where there is neither a *requisitioning* nor a *mere negative prohibition*. The prohibition in this case must be read as subsidiary to the main purpose of the Act, which is that the appellants should provide an efficient economical and convenient system of transport to meet the requirements of the public, or in other words the appellants are legally

(1) [1927] 1 K.B. 458, 467.

bound by the Act of 1948 to take up and carry on the work which the respondents by that Act are forbidden to carry on.

This in my opinion constitutes an attempt to take a portion of the property of the respondents without compensation, and is therefore ultra vires the Legislature of Northern Ireland

BLACK L.J.: I entirely agree with the conclusions arrived at in the judgment which has just been delivered by the Lord Chief Justice.

The respondents, according to paragraph 7 of the case stated, have carried on the business of furniture removal and storage since 1898. This business, according to paragraph 8 of the case, has involved the removal and carriage throughout the whole of what is now Northern Ireland, of furniture to and from the quays and the premises of furniture dealers, furniture manufacturers, furniture vendors and purchasers, auctioneers, private persons, and the respondents' own premises. Section 15 (1) of the Road and Railway Transport Act (Northern Ireland), 1935, enacted that no person other than the Northern Ireland Road Transport Board should use a motor vehicle on a public highway for the carriage of merchandise for hire or reward except with the consent in writing of the Board and the approval of the Ministry of Home Affairs. Sub-section 4 (*e*) however of section 15 provided that the section should not apply to the use of a motor vehicle for the collection or delivery of furniture collected or delivered by a person in connection with his business as a remover or storer of furniture. The Act of 1935 accordingly left the respondents free to carry on their business of furniture removal and storage, and the effect of section 5 (1) (*c*) of the Act was to exempt their undertaking from the general provisions of the Act providing for the compulsory transfer of road motor undertakings to the Road Transport Board.

So matters remained until the passing of the Transport Act (Northern Ireland), 1948. Section 4 of that Act conferred very wide powers on the present appell-

ants, the Ulster Transport Authority, which undoubtedly include a power to engage in the business of furniture removal and storage. As appears from paragraph 13 of the case stated, the appellants have availed themselves of this power; they do all kinds of furniture removal work and have been doing so ever since the passing of the 1948 Act, since when they have been in active competition with the respondents.

By section 18 of the 1948 Act it was enacted that save as provided by section 19 of the Act no person other than the appellants should use a motor vehicle on a public highway to carry any merchandise for reward, except with the consent in writing of the appellants and the approval of the Ministry of Commerce. The only provision of section 19 relevant to the present case is that contained in section 19 (1) (*d*) viz., that the provisions of section 18 should not apply to or affect "the use, by a person who carries on, "from a principal place of business in Northern "Ireland, the business of a remover or storer of "furniture, of a motor vehicle to move furniture or "effects, not being part of the stock in trade of the "owner thereof, from or to premises occupied by such "owner to or from other premises occupied by such "owner or to or from a store."

It will be seen that these provisions fetter substantially the freedom to carry on their business which was preserved to furniture removers by the Act of 1935. The present proceedings arose out of the prosecution of the respondents at Dungannon Petty Sessions on October 22, 1951, on a charge of having used a motor vehicle on the public highway on April 20, 1951, to carry merchandise for reward without the consent in writing of the appellants and the approval of the Ministry of Commerce, contrary to section 18 (1) of the Act of 1948. The facts of the case were that one Arthur Patrick McGrath, who carried on business as a furniture dealer in Coalisland, County Tyrone, had purchased a quantity of furniture for his business at an auction held at the premises of Messrs. John Ross & Co., a firm of auctioneers in Belfast, and that the respondents

had, on the orders of Messrs. Ross, carried the furniture for reward in a motor vehicle from Messrs. Ross's premises in Belfast to Mr. McGrath's premises in Coalisland without having obtained the consent of the appellants or the approval of the Ministry. The learned resident magistrate convicted the respondents but stated the present case for the opinion of the superior court. The respondents' contention was that the effect of sections 18 and 19 of the Act of 1948 was to take portion of the respondents' business without compensation, and that provisions in a Northern Ireland statute, in so far as they had this effect, were ultra vires the Parliament of Northern Ireland by reason of the terms of section 5 (1) of the Government of Ireland Act 1920 which provides (inter alia) that in the exercise of its power to make laws the Parliament of Northern Ireland shall not make a law so as either directly or indirectly to take any property without compensation.

It is found in paragraph 7 of the case stated that the furniture removal business of the respondents, which as stated in that paragraph they have carried on since 1898, is a substantial business from which the respondents have throughout the said period and up to the present time made substantial profits. It is also found (in paragraph 15) that there is a very considerable goodwill attaching to the respondents' furniture removal business, which goodwill is quite separate and distinct from that of any other business carried on by the respondents, and (in paragraph 11) that the goodwill of the respondents' business as furniture removers at the time of the passing of the Act of 1948 applied to the carriage of furniture in the manner objected to in the proceedings from which the present case stated has arisen. In paragraph 17 of the case it is found that the operation of sections 18 and 19 of the 1948 Act will cause the respondents to lose a substantial amount of their furniture removal business. It is found too (in paragraph 12) that if the respondents are prohibited by the operation of the 1948 Act from carrying furniture to or from the premises of Messrs. John Ross & Co. then in addition to losing Messrs. Ross's work they

would also, from that cause alone, lose important and substantial business connections and work arising therefrom and goodwill, and that their furniture removal business would be seriously and adversely affected. It is also found (in paragraph 10) that if the respondents are prohibited by the operation of the 1948 Act from carrying furniture to or from the premises of Messrs. John Ross & Co. the appellants will have to be employed to do that work or any part thereof which the respondents may be prevented from doing. And in paragraph 14 it is found that the appellants, taking advantage of the 1948 Act, wish and intend if possible to acquire a monopoly in furniture removal work.

In the case of an old established and successful profit making undertaking such as the respondents' furniture removing business, the assets of the proprietors of the business do not consist solely of physical and tangible possessions. In addition they have another asset which may be of considerable value, the expectation that old customers will continue to do business with them, and that some new customers may be attracted by reason of the repute which the undertaking has obtained. It is this expectation which gives an old established and successful business a value over and above that of a similar business which has yet to establish itself. This intangible asset is commonly spoken of both in popular language and in reported decisions as the goodwill of a business. The term goodwill when used in connection with a business is no doubt a term which is apt to have attached to it many different shades of meaning. I do not propose to attempt to examine the various meanings which the term may bear. For the purpose of the present judgment I use the term as a convenient word to designate the asset of the respondents which I have attempted to describe. From the facts set out in the case stated it is clear that the respondents possessed an asset of this type in connection with their furniture removal business. As a result, presumably of years of hard work, good service and fair dealing, they had

built up an expectation that customers whom they had already served would return to do business with them, and that their reputation would, perhaps, attract new customers. If they had been minded to sell their business they would legitimately have expected to obtain from a purchaser in consideration for this goodwill, as I am content to call it, a sum, and perhaps a substantial sum, over and above the value of the other assets of the business. Now, however, as a consequence of the passing of the Act of 1948, and of the determination of the appellants to take advantage of its provisions to acquire if possible a monopoly in furniture removal work, the respondents will, if the relevant provisions of the Act are valid and enforceable, lose a portion at least of that goodwill.

The respondents, as I have said, contend that sections 18 and 19 of the Act of 1948, in so far as they have this effect, infringe the provisions of section 5 of the Government of Ireland Act 1920, prohibiting the Parliament of Northern Ireland from making laws so as either directly or indirectly to take any property without compensation.

From the arguments which were addressed to the Court it would appear to me that a number of observations fall to be made with regard to the effect of this section 5.

In the first place I am clearly satisfied that the section not only prohibits the Parliament of Northern Ireland from making a law purporting in explicit terms to deprive a person of property without compensation, but that it also precludes the Parliament from legislating in such a way as to authorize or sanction or render possible the taking of property without compensation.

Then as regards the construction of the section it has been decided in this Court in *O'Neill v. The Northern Ireland Road Transport Board* (1), that the word "property" in the phrase "or take any property "without compensation" contained in section 5 (1) does not refer merely to property of a religious denomination but is intended to include property of any owner whatever. With this construction I respectfully agree.

(1) [1938] N.I. 104.

It was argued, however, on behalf of the appellants that the meaning of property in the section should be confined to physical or tangible property, and should not include intangible property such as goodwill. I do not see why this should be so—that the owner of tangible property should be protected while the owner of intangible property should go unprotected. This would indeed be a strange differentiation for the Legislature to have made. Moreover, the phrase used in the section is " any property " and, as was recently pointed out in this court on the construction of another statute, " any " is a word with a very wide meaning and prima facie the use of it excludes limitation. It is, perhaps, worthy of note that in *O'Neill's* case (1) one of the major issues between the parties was as to whether compensation for the goodwill of the claimant's undertaking could legitimately be paid in depreciated Transport " B " Stock ; On this issue the present appellants' contention that the phrase " any property " in section 5 (1) was to be construed as referring merely to tangible property and not to intangible property such as goodwill would have been decidedly pertinent. But no suggestion to this effect appears to have been made by anyone during the course of the case.

That the element in the respondents' assets which I have called goodwill is a type of property can, I think, admit of little doubt. On a sale of the respondents' undertaking both the vendors and the purchaser would take this asset into account. On a contract for sale such an asset would be regarded as property for the purposes of the Stamp Duty Acts. And on the death of an individual owning a business which included such an asset the Estate Duty authorities would clearly be entitled to treat it as property passing on his death : *A.-G. v. Boden*, per Hamilton J. (2). There are many dicta of the highest authority referring to goodwill as a type of property. I need only refer to the judgments in *The Commissioners of Inland Revenue v. Muller & Co.'s Margarine Limited* (3). It

(1) [1938] N.I. 104.
(2) [1912] 1 K.B. 539, 556.
(3) [1901] A.C. 217.

will be found that what is there called goodwill bears a close similarity to the asset which I have endeavoured to describe, the expectation that old customers will continue to do business and that new ones will be attracted by the reputation of the undertaking. I am, accordingly, clearly of opinion that this asset of the respondents is a type of property within the meaning of that term as used in section 5 of the Act of 1920.

But it is said that even if the respondents owned an asset such as I have described, and even if such an asset could be considered property within the meaning of section 5 (1) of the Government of Ireland Act 1920, still it could not be truly said that the effect of the Act of 1948 is to "take" that property so as to infringe the provisions of section 5. It is contended that a taking within the meaning of section 5 necessitates a transferee or recipient, and that in the present case even if the respondents have lost anything by reason of the operation of sections 18 and 19 of the Act of 1948, nevertheless the asset which they have lost has not passed to the appellants. I cannot accept this contention. In the first place I would be slow to hold that a taking within the meaning of section 5 necessarily involves the existence of a transferee. Section 5 was obviously passed for the protection of owners of property and must be construed from that standpoint. When a person's property is sought to be taken from him under colour of a statute it would seem to matter little to him whether the property is going to be enjoyed by the taker or whether it will be destroyed or disappear in the act of taking. In the present case, however, it is not necessary to express a final judgment on this point. For as appears from the case stated the effect of sections 18 and 19 of the Act of 1948, so far as the respondents are concerned, will be that a considerable part at any rate of what they claim the sections will take from them will be found after the taking in the possession of the appellants. What the respondents will lose will be the valuable expectation which they enjoyed before the Act of 1948 that their customers of a certain class would continue to do business with them. If sections 18 and 19 are valid it

will become illegal for the respondents to do the work of these customers. Most, if not all, of these customers will have to resort to the appellants to do the work for them which has heretofore been done by the respondents. Accordingly, the expectation that the respondents' old customers will come in the future to do business will not only have passed from the respondents but will, to a substantial degree at any rate, have passed to and become firmly vested in the appellants.

It remains only to consider an alternative contention which was advanced towards the close of the argument on behalf of the appellants. Even assuming, it was said, that the effect of the Act of 1948 was to bring about a taking of the respondents' property, it was contended that nevertheless the statute did not contravene the provisions of section 5 (1) of the Act of 1920 inasmuch as it did not purport to debar the respondents from instituting proceedings against the appellants for the recovery of compensation. This contention was based on a dictum in the speech of Lord Atkinson in *Central Control Board (Liquor Traffic) v. Cannon Brewery Company Limited* (1), that "where "the statute authorizing the taking away of, or causing "damage to the subject's property, either does not "provide a special tribunal to access the amount of "compensation the subject is to receive, or only pro- "vides a tribunal which has become non-existent, the "subject is entitled to have the amount assessed in "the High Court of Justice." I think, however, the important words here are "the amount the subject is "to receive." Lord Atkinson on my reading of his speech was only dealing here with the manner in which compensation was to be assessed. He was assuming that the case was one in which a legal right to receive compensation existed. A legal right to obtain compensation was not to be balked by the failure to provide a tribunal for its assessment. No doubt Lord Atkinson had referred just previously to the well established canon of construction that an intention to take away the property of a subject without giving

(1) [1919] A.C. 744, 752.

to him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms. But the intention of any particular statute must be deduced from a consideration of the provisions of the statute itself. On a dispassionate consideration of the Act of 1948 I do not think that anyone could come to a conclusion other than that the transfer of certain parts of furniture removers' businesses from their owners to the appellants, which would be the result of the provisions of sections 18 and 19 of the Act, was intended by the Legislature to be effected without any liability to pay compensation to the owners of those businesses. When one has regard to the alteration of the wording of section 19 (1) (*d*) from the wording of section 15 (4) (*e*) of the Act of 1935, the conclusion appears irresistible that one of the objects of the Act of 1948 was to secure for the appellants the acquisition of certain portions of businesses which had been exempted from the compulsory vesting provisions of the 1935 Act, and to do so in a way which would not involve the payment of compensation by the simple device of forbidding anyone other than the appellants from engaging any longer in such activities. It is, of course, an obvious remark that if the device were to be held successful on the present occasion it could be gradually extended in future statutes until the appellants had taken over all the outstanding profit earning transport businesses in Northern Ireland without the necessity of paying for them.

Accordingly I agree that the order of the Queen's Bench Division should be affirmed. Their answer, however, to the question whether the learned resident magistrate was right in law in holding that section 18 (1) of the 1948 Act was not ultra vires should be varied in the manner proposed by the Lord Chief Justice.

Appeal dismissed.

Solicitor for the Authority, *J. D. Coates.*

Solicitors for the respondents : *John Johnson & Son*

J.P.

SMITH v. HOWDENS LTD. (1).

Master and servant—Duty of employer to take reasonable care for safety of workman—Extent of duty—Whether employer bound to provide means for mitigating consequences of foreseeable accidents.

The plaintiff, a seaman on a small coastal steamer, suffered a wound to his finger as the ship was leaving port for a voyage of about eighteen hours duration. Later the wound became septic and the plaintiff was incapacitated for work and suffered some permanent injury. The wound was caused by a steel rope supplied by the employers, but the jury found that the employers were not negligent in failing to take care to provide and maintain proper appliances for working the ship. The plaintiff had averred that the ship was not adequately supplied with first-aid equipment and that this fact contributed to the disability which the wound caused, but the trial judge ruled that there was no duty on the employers to provide medical appliances for the use of the crew and declined to leave any questions to the jury on this issue.

Held by the Court of Appeal (Lord MacDermott L.C.J. and Porter L.J., Black L.J. dubitante) that the trial judge was wrong in so ruling.

The duty imposed at common law on a master to take reasonable care for the safety of his workmen may in certain circumstances go beyond the prevention of injury and oblige him to make provision for avoiding or mitigating the foreseeable consequences of injury.

Held, however, that, as there was no evidence on which the jury could find that any negligence of the defendants in failing to provide medical appliances contributed to the plaintiff's disability, the verdict and judgment in favour of the defendants should not be disturbed.

APPEAL from a judgment entered for the defendants in an action tried by Sheil J. with a special jury.

The plaintiff was employed as first mate on a small coastal steamer owned by the defendants, and on July 30, 1951, as the ship was leaving Larne Harbour for Garston, a voyage which normally takes about eighteen hours, the plaintiff suffered a small punctured wound in the index finger of his right hand. The wound was caused by a broken strand or jagged part of a steel rope which the plaintiff was handling. The plaintiff stated in evidence that the ship's first-aid

(1) In the Court of Appeal before Lord MacDermott L.C.J. Porter and Black L.JJ.: Jan. 28, 29; May 18, 1953.

kit contained neither antiseptics nor bandages, and that the only precautions he was able to take against infection were to wash the wound in water and to apply a piece of adhesive tape of his own. When the ship arrived at Garston the finger was sore and swollen and by the time he returned home a few days later and obtained medical attention it had become infected.

The plaintiff in his statement of claim alleged negligence on the part of the defendants: firstly, that they had failed in their duty to provide and maintain proper appliances for working the ship, and secondly, that they had "failed and neglected to provide the necessary antiseptics or surgical or other appliances or medicines" to deal with accidents such as the plaintiff had sustained.

The trial judge in his summing up indicated to the jury that in law the defendants were under no duty to provide medical equipment for use by the crew in case of injury, and that they might direct their attention exclusively to the first allegation of negligence, and he refused a request by counsel for the plaintiff to leave any question to the jury relating to a failure to supply medical appliances.

The questions left to the jury with their answers were as follows:—

1. Did the defendants fail to take reasonable care to provide proper appliances? *Answer*—No.
2. Did the defendants fail to take reasonable care to maintain appliances in a proper condition? *Answer*—No. But there was a defect in the rope at the time of the accident.
3. If the answer to 1 or 2 or both be "Yes" was the accident caused by such failure? *Not answered.*
4. Damages? *Not answered.*

On these findings the trial judge entered judgment for the defendants. The plaintiff now appealed, contending that the jury's answers were inconsistent and repugnant and that the judge was wrong in law in

ruling that the defendants were under no obligation to supply medical equipment and in refusing to leave any question to the jury on this issue.

McVeigh Q.C. and *McCorry* for the appellant.
Hanna Q.C. and *Blair* for the respondents.

Cur. adv. vult.

LORD MACDERMOTT L.C.J.: On July 30, 1951, Robert Smith, the plaintiff and appellant, met with an accident while in the employment of the defendants as mate on their steamer the "Snow Queen". The accident occurred as the vessel was leaving Larne Harbour for Garston, a voyage which normally takes about eighteen hours. In the course of getting clear of the quay the plaintiff, while handling a steel rope, the property of the defendants, was injured by a broken strand or jagged part of the rope which inflicted a small punctured wound on the index finger of his right hand. According to the plaintiff's evidence the ship's first-aid kit contained neither antiseptics nor bandages and he had to rest content with washing his hand in water and applying a piece of adhesive tape of his own to the injured part. On arrival at Garston the finger was sore and had commenced to swell, and by the time the plaintiff returned to his home near Belfast a few days later and got medical attention it had become grossly infected. As a result, the plaintiff has been incapacitated for work and the finger is still stiff.

In his statement of claim the plaintiff alleged negligence of two kinds. First of all, he said, with special reference to the steel rope, that the defendants had not taken reasonable care to provide proper plant and appliances and to maintain them in a proper condition; and secondly, he said that the defendants had "failed and neglected to provide the necessary antiseptics or surgical or other appliances or medicines" to meet an accident such as his.

The learned trial judge left four questions to the

jury. These, and the answers given, were as follows :—

1. Did the defendants fail to take reasonable care to provide proper appliances ? *Answer*—No.
2. Did the defendants fail to take reasonable care to maintain appliances in a proper condition ? *Answer*—No. But there was a defect in the rope at the time of the accident.
3. If the answer to 1 and 2 or both be "Yes" was the accident caused by such failure ? *Not answered.*
4. Damages ? *Not answered.*

Upon these findings judgment was entered for the defendants, and the plaintiff now asks that judgment be entered for him or, alternatively, that he be granted a new trial. His appeal was rested on two grounds. The first of these was to the effect that the jury's answers were inconsistent and repugnant. This was but faintly argued and is unsustainable, the answers referred to being clearly consistent, and the defect in the rope being compatible with the exercise of reasonable care on the part of the defendants in the maintenance of their gear.

It was agreed by counsel that question 1 did not extend to medical or surgical requisites, and the second ground of appeal was that further questions should have been submitted to the jury to make good this omission. The nature of these additional issues appears from the following questions which are set out in the plaintiff's requisition and also in his notice of appeal :—

(i) Were the defendants guilty of negligence in failing to provide necessary antiseptics, medicines and dressings for the plaintiff ?

(ii) Did the said negligence cause or contribute to the plaintiff's present disability ?

It was also agreed by counsel that, at the conclusion of the evidence, the learned trial judge had held, as a matter of law, that there was no duty upon the defendants to supply the vessel with antiseptics, medicines

and dressings for the use of the crew including the plaintiff, and that he had indicated this point of view in his charge to the jury so as to direct its attention exclusively to the plaintiff's first allegation of negligence, namely, the failure to provide and maintain proper plant and appliances for working the ship, such as the wire rope which caused the plaintiff's injury.

As the "Snow Queen" was voyaging between one part of the United Kingdom and another at the time of the accident it seems clear that there was no statutory duty upon the defendants to provide medical stores for the use of those on board. Section 200 (2) of the Merchant Shipping Act, 1894, relates only to ships navigating between the United Kingdom and some place outside it. The plaintiff, however, based the ground of appeal now under discussion on the existence of a common law duty, the substance of the argument on his behalf being that it was the duty of an employer to take reasonable care for the safety of his workmen and that there was ample evidence on which the jury could have found that the defendants had failed therein in that they had made no proper provision for the dressing and care of wounds sustained on a voyage long enough to make first-aid treatment a reasonable and proper precaution if injurious consequences were to be avoided. Against this, the defendants contended that their obligations as employers did not include a duty to supply medical stores except in so far as Parliament had so directed, and that in any event there was nothing in the evidence to show that the use of any medical stores which might reasonably have been provided would have saved the plaintiff from the infection that was the real cause of his incapacity.

In these circumstances it seems to me that two questions call for consideration—(1) Was the learned trial judge correct in law in ruling that the defendants were under no duty to provide medical stores (by which I mean medical or surgical requisites, such as antiseptics, dressings and bandages, suitable for the treatment of wounds) for the voyage in question?

and (2) if the learned judge was wrong in so ruling was there a case to go to the jury as respects the alleged lack of such stores ?

As regards question (1), the reports, rather strangely, appear to have little to offer of real assistance. In *Couch v. Steel* (1) the second count of the declaration alleged that during a voyage from Plymouth to Aden and from Aden to Calcutta the defendant, as owner of the vessel on which the plaintiff was serving as a seaman, had neglected to provide on board " a sufficient " and proper supply of medicines and medicaments " suitable to accidents and diseases arising on sea " voyage : whereby . . . plaintiff was unable to be " cured of his said sickness . . . and suffered great " pain etc.". This was held good on demurrer. But while the terms of this count are as capable of applying to a common law as to a statutory duty, it is evident from the report that the claim was treated on all sides as founded on a breach of statutory duty, and the judgments do not deal with the sufficiency of the second count apart from the provisions of the relevant enactment. *Woolf v. Claggett* (2) was also cited. That was an action of a policy of assurance in which the plaintiff sought to meet a defence of deviation by showing that it was necessary to put into Plymouth, a port admittedly out of the common course of the voyage, in order to obtain treatment for the captain and mate who had fallen ill. Lord Eldon was of opinion that the plaintiff had not made out his case, it appearing that the surgeon of the ship was unprovided with the proper instruments and medicines. This decision certainly indicates that a well-found vessel should be equipped with the medicines and instruments which the surgeon on board would require in order to deal with what Lord Eldon referred to as " the common casualties of mankind." But it does not touch upon the ambit of the duty owed by the employer to his servants and I do not think it throws much light on the present problem. Reference was

(1) (1854) 3 El. & Bl. 402. (2) (1800) 3 Esp. 257.

also made to several cases, such as *Wennall v. Adney* (1) in support of the proposition that (in the absence of agreement) a master is not liable for the cost of medical attendance upon or the supply of medicines to his servant, even in respect of injuries suffered in the course of the employment. These cases, however, were mainly concerned with the master's liability for services rendered or goods furnished by or at the expense of a third party and they appear to me to have little to say to the question of what an employer ought to provide for the safety of his workmen.

In this absence of direct authority it was perhaps to be expected that we should hear in the course of the argument more than a passing reference to Lord Atkin's observations in *Donoghue v. Stevenson* (2) on "Who, then, in law is my neighbour?" That most important decision, however, stands on the frontiers of actionable negligence and I do not regard it as intended to afford guidance on the obligations arising from a relationship so well-known to our jurisprudence and so long the subject of judicial consideration as that of employer and workman. I therefore turn from it to examine the relevant obligations which flow from that relationship, pausing only to remark that, when dealing with circumstances which are novel in the sense that they have not been adjudicated upon before, it is well to remember the warning conveyed by Lord Macmillan's memorable words: "The criterion "of judgment must adjust and adapt itself to the "changing circumstances of life. The categories of "negligence are never closed" (3).

That the law casts upon an employer the duty to take reasonable care for the safety of his workmen is a well-established principle. See *Smith v. Baker* (4) per Lord Herschell; *Wilsons and Clyde Coal Co. Ltd. v. English* (5) per Lord Wright; and *Paris v. Stepney Borough Council* (6) per Lord Oaksey. Within this

(1) (1802) 3 Bos. & Pul. 247.
(2) [1932] A.C. 562, 580.
(3) Ibid. 619.
(4) [1891] A.C. 325, 362.
(5) [1938] A.C. 57, 84.
(6) [1951] A.C. 367, 384.

general duty, and exemplifying it, the courts have defined several categories of obligation in broad terms, that most germane to the present case being the duty to take reasonable care to provide proper appliances and equipment. Now it is clear that that broad duty will not necessarily be discharged merely by providing whatever is reasonably needed for the due performance of the work in hand. The obligation may extend to what is reasonably necessary for the protection of the workman, as witness the goggles which the employer should have provided in *Paris v. Stepney Borough Council* (1). This, indeed, was not disputed, but Mr. Hanna for the defendants submitted that the duty in question did not go beyond the *prevention* of injury. There was, he contended, no obligation on an employer to take reasonable care to provide treatment or the means of treatment so as to minimise or cure an injury received by his workman in the course of the employment. This is a far-reaching proposition which gives the appeal a general importance that it would not otherwise have. Its relevance, however, is clear, for the whole complaint on this branch of the case turned on the contention that it was the infection and not the original injury which was the real cause of the plaintiff's disablement and that the infection could have been arrested in time or avoided altogether had suitable medical stores been available when the accident occurred.

If Mr. Hanna's proposition is right the learned judge was undoubtedly justified in his ruling. But, in my opinion, the proposition is too sweeping and arbitrary to be acceptable as a principle of general applicability. I do not wish to travel outside the relationship of employer and workman or to deal with conditions within it which are not directly connected with the work. Nor am I to be taken as suggesting that there is a duty on all employers to provide for the immediate treatment of all injuries received in the course of the employment. In this field the relevant circumstances may present such an infinite variety that is it not

(1) [1951] A.C. 367.

possible to lay down any rule in such wide and rigid terms. What I am unable to accept is the equally wide proposition that, irrespective of circumstances, an employer's duty at common law to take reasonable care for the safety of his workmen never involves an obligation to provide for the treatment of those injured at work. Much may, of course, depend on such matters as the nature of the injury, the efficacy of immediate treatment, and the alternative facilities available. The injured workman, for example, may be in a position to get proper treatment with all desirable speed from his own doctor or a local hospital. On the other hand, the nature of his work may so isolate him as to make this impossible; his task may lie in some inaccessible region or he may be a sailor at sea without any chance of getting skilled assistance as soon as it is needed. I can see no rational ground for holding that the duty to take reasonable care for the safety of a workman may ignore all such variations of circumstance and remain invariably blind to his plight *after* the injury has been sustained. Why should the precautions which an employer ought at common law to take for the safety of those who work for him cease with the injury and disregard all effective first-aid measures to reduce the gravity of its consequences which might reasonably be taken? I can think of no answer to this question which does not give safety an artificial and sardonic meaning. *Paris v. Stepney Borough Council* (1) decided that the duty under discussion must take account of the fact that the workman concerned suffered from a disability known to his employers which would make the consequences of accident, in certain events, more serious for him than for his fellows. The duty has thus to be ascertained with due regard to the foreseeable consequences for the individual: and that being so it is, to my mind, all the harder to find logical support for the view that the duty has nothing whatever to say to the provision of reasonable means for reducing

(1) [1951] A.C. 367.

or obviating what, according to the ordinary course of events, are the foreseeable consequences of the accident. If the duty must take account of the foreseeable effect upon a particular individual it would be strange indeed if it could ignore all that might reasonably be done to prevent aggravation of the injured workman's condition. I cannot but feel that if the submission under consideration is sound the resulting state of affairs may often be, not only anomalous but highly unreasonable. And that, I think, comes to more than comment, for when one is investigating the ambit of a duty to take reasonable care, the care to be expected of an ordinary prudent employer, unreasonable curtailment no less than unreasonable expansion of that duty ought surely to be avoided if the way to do so is open.

My conclusion thus far, therefore, is that the learned judge's ruling finds no support in the proposition that the duty to take reasonable care for the workman's safety does not go beyond the prevention of injury. This, however, is not enough to dispose of question (1) as the same ruling could yet be justified if the undisputed facts of the case were such as to negative, in this particular instance, the existence of a duty to provide medical stores. The duty can only arise when the step it requires are reasonable in the circumstances and, as I have already indicated, there may be situations in which it would not be reasonable to expect an employer to make such provision. But I do not think the state of the evidence here would justify putting this case into that category. The accident could not be regarded as of an unusual or exceptional character in the working of a ship; the length of the voyage put immediate skilled aid out of the question; and it had undoubtedly been the practice on board the "Snow Queen" to have a medicine chest or first-aid box. There was controversy as to whether this had been replenished and as to what it contained when the plaintiff received his injury, but nothing at all to suggest that anyone thought it an unnecessary or superfluous part of the ship's equipment. In this state of affairs I think it would clearly have been open

to the jury, if it accepted the plaintiff's evidence as to the contents of the medicine chest, to hold the defendants negligent in not having kept it adequately stocked.

For these reasons, I am of opinion that the learned judge was wrong in ruling as he did and that the answer to question (1) should be in the negative.

Question (2) raises an issue of causation. If the defendants were at fault as regards the provision of medical stores, did this cause or contribute to the gross infection which incapacitated the plaintiff? In my opinion, the evidence is insufficient to show that it did. It points, indeed, with one possible exception, rather the other way. Mr. Henry H. Hall, a surgical consultant called for the plaintiff, said: "Washing it out with antiseptic would have been good at the "beginning. Ordinary antiseptic and cleaning out "at the time would have helped it—I mean cleaning "it out to the bottom. Mere antiseptic would not "have been enough. It would have been important "to have applied antiseptic and cleaning out as soon "as possible. If you get these things in first few "hours it makes all the difference". Then, to a question by the judge, he added: "Mere application "of antiseptic in case of small punctured wound would "not necessarily suffice". Dr. William Gordon Jackson, the plaintiff's medical adviser, agreed with this testimony. For the defendants, Mr. Eric McMechan, another surgical consultant, said: "Appli- "cation of an antiseptic would not, I think, have "helped because of small wound at surface. Proper "treatment would be to open up wound and remove "any foreign material in it and also penicillin treat- "ment". The last medical witness to deal with this aspect of the matter was Dr. Robert Caldwell, who had examined the plaintiff on behalf of the defendants. He said in his direct examination: "Appli- "cation of antiseptics shortly after probably would "not have prevented it"; but he added on cross-examination—and this is the exception I have mentioned—: "Use of antiseptic might have pre- "vented it".

To my mind, this last sentence cannot fairly be read as offering a way past all that has gone before on this subject. At most, it voices a possibility, but it seems to me that the entire medical testimony, including that of this witness, makes it clear that the probabilities were all against such use of antiseptics as a layman might make being effectual to stop infection in the kind of wound which the plaintiff had sustained. That being so, I do not think there was any material on which the jury could have found a verdict for the plaintiff, even if satisfied that the defendants had been negligent concerning the provision of medical stores. I am accordingly of opinion that question (2) should also be answered in the negative.

On these answers the appeal fails and must be dismissed.

PORTER L.J. : I concur.

BLACK L.J. : The plaintiff's claim in this action was founded on two allegations of negligence on the part of the defendants, first that the defendants were negligent in failing to provide a safe and adequate wire hawser and tackle of good construction and sound material and of adequate strength and free from patent defect, and second that the defendants were negligent in failing to provide the necessary antiseptics or other appliances or medicines to deal with an injury such as the plaintiff sustained.

The first of these allegations of negligence was negatived by the answers which the jury returned to the questions submitted to them by the trial judge. It was clearly open to the jury on the evidence to return these answers and accordingly this court cannot interfere with the jury's findings on this part of the case.

As regards the other allegation of negligence, counsel for the plaintiff submitted at the trial that questions should be left to the jury in some such form as follows :—

(i) Were the defendants guilty of negligence in

failing to provide necessary antiseptics, medicines and dressings for the plaintiff? and

(ii) Did the said negligence cause or contribute to the plaintiff's present disability?

The learned trial judge however refused to leave these questions to the jury and it was almost entirely to this aspect of the case that the argument in this court was addressed. The contention of the plaintiff was that the defendants as his employers were under a common law duty to provide on board ship a supply of dressings and antiseptics adequate for first-aid treatment of such accidents as might be expected to occur to members of the ship's company and that the plaintiff's present disability was caused or contributed to by the defendants' failure to provide such dressings and antiseptics. If the defendants were under an obligation to provide dressings and antiseptics then in order to succeed in an action based upon breach of that obligation it would be necessary for the plaintiff to establish not only that the defendants had failed to provide the dressings and antiseptics but also that their failure to supply them had caused or contributed to his disability.

As to whether a supply of dressings and antiseptics was in fact available on board the ship at the time of the accident there was a sharp conflict of evidence between the plaintiff on the one hand and the master of the ship on the other. Such a conflict is of course not one which this court can attempt to resolve.

The defendants' main contention in this court was that they were not in law under any obligation such that alleged by the plaintiff. But they also strenuously argued that even if they were under such an obligation and even if the fact was that they had failed to provide proper dressings and antiseptics, still the evidence adduced at the trial was not such as would justify a jury in holding that the plaintiff's disability was either caused or contributed to by such failure.

It is clear from the trial judge's notes that at the trial the action was fought almost entirely on the issue of the alleged negligence on the part of the defendants

in supplying a wire hawser which was not in safe and proper condition and that but little attention was directed to the other issue, which has become the important one on this appeal, whether the plaintiff's disability was caused or contributed to by negligence of the defendants in failing to provide a proper supply of dressings and antiseptics. On this issue the onus would lie upon the plaintiff to satisfy the jury that the disability from which he now suffers could have been prevented by the use of such dressings and antiseptics as ought reasonably to have been provided. The evidence to satisfy the jury on this point would naturally be looked for in the testimony of the medical witnesses. One would expect that they would be asked to say what dressings and antiseptics it would be reasonable to require the defendants to provide and then to say whether the application of such dressings and antiseptics by a member of the ship's company to the particular injury sustained by the plaintiff would have prevented the unfortunate consequences which have resulted from that injury. Two medical witnesses were called on behalf of the plaintiff at the trial. The remarkable fact is that so far as appears from the report of the trial not a single question was put to either of these witnesses in their direct examination either as to what medical supplies they considered ought to have been provided or as to whether the use of such supplies by a member of the ship's company would have prevented the disability from which the plaintiff now suffers. One of these witnesses, Mr. Hall, a well known surgical consultant, was however asked some questions on the point in cross-examination. It is to be remembered that the wound which the plaintiff sustained was a small punctured wound, what the plaintiff himself described as a jag. Mr. Hall's evidence was that the proper treatment at the beginning would have been to clean out the wound to the bottom and to have applied an antiseptic. In the case of a small punctured wound such as the plaintiff had suffered, Mr. Hall's view was that it was important both to clean out the wound and to apply the antiseptic as soon as possible.

In answer to a question in cross-examination Mr. Hall said that mere antiseptic would not have been enough and to a question put by the judge he said that mere application of antiseptic in the case of a small punctured wound would not necessarily suffice. Dr. Jackson, the other medical witness called by the plaintiff, was not asked any question directed specifically to the point either in direct examination or in cross-examination, but he said that he agreed with Mr. Hall's evidence absolutely. The defendants' principal medical witness was Mr. McMechan, also a well-known surgeon. Mr. McMechan took the same view as Mr. Hall. He said that the application of an antiseptic would not, he thought, have helped because of the small wound at the surface. The proper treatment according to Mr. McMechan would be to open up the wound and remove any foreign material in it and also to give penicillin treatment. Dr. Calwell, the other medical witness called by the defendants, said in direct examination that the application of antiseptics shortly after the accident would not have prevented the disability but conceded in cross-examination that the use of antiseptic might have prevented it.

It is clear that the whole weight of the evidence of the medical witnesses was to the effect that in view of the nature of the plaintiff's wound the mere application of an antiseptic would not have been likely to prevent the infection which resulted in the disability from which the plaintiff now suffers and that the proper treatment would have been to clean out the wound as well as applying the antiseptic. There was no suggestion that there was any member of the ship's company qualified to undertake this operation. Accordingly, on the assumption that the defendants had failed to provide proper antiseptics and that they were guilty of a breach of duty to the plaintiff by not providing them, I do not think that the jury would have been justified on the evidence presented to them at the trial in inferring that the plaintiff's disability would have been prevented by the provision in the ship of the suggested medicaments. Even if the trial

judge had left to the jury the two questions suggested by plaintiff's counsel and if the jury had found the defendants guilty of negligence in failing to provide proper medical stores I think that upon the evidence as we have it in the report of the trial it would have been the duty of the jury to hold in answer to the second of these suggested questions that the evidence fell short of justifying the conclusion that that negligence caused or contributed to the plaintiff's present disability.

This is sufficient to resolve the case in favour of the defendants and accordingly I do not find it necessary to form a concluded opinion on the question whether the defendants should be held to have been guilty of negligence if in fact a supply of antiseptics and dressings was not available on board their ship. It is now well established that it is the duty of an employer to take reasonable care for the safety of his employees. I am not aware of any decided case in which this common law responsibility has been held to extend so far as to require employers to provide the requisites for first-aid treatment of their employees in case of accident. Such a requirement has been imposed by statute in certain specific cases, e.g., by s. 200 of the Merchant Shipping Act, 1894, and by s. 46 of the Factories Act (Northern Ireland), 1938. But quite apart from statute I do not see on principle why the common law duty to take reasonable care for the safety of employees should not include a responsibility to provide the requisites for first-aid treatment in cases in which from the nature of their duties employees may meet with accidents. In the recent case of *Clifford v. Charles H. Challen & Son, Ltd.* (1), an employee was engaged at a task which involved the danger of his contracting dermatitis. It was held by the English Court of Appeal that not only were his employers under a common law duty to provide in their workshops a supply of recognized prophylactic cream for his use but that they were even under a duty to have in operation such a system

(1) [1951] 1 K.B. 495.

of working as would secure, so far as reasonably possible, that their workers would make use of the prophylactic. I cannot see any difference of principle which would on the one hand require an employer to provide a prophylactic cream for employees engaged in work which involved the danger of contracting dermatitis but would on the other hand absolve the owners of a coasting vessel on which there must be a daily risk of minor accidents from the obligation of providing a suitable first-aid outfit. Indeed it may be said that the evidence shows that the defendants themselves recognized that it was reasonable to provide such an outfit, for the evidence of the master of the ship was emphatic that there was a medicine chest on the ship, that it was his duty to see that it was kept up, that it had been taken ashore and replenished some time before the accident, that he had personally seen the interior of it when it came aboard, and that it contained, inter alia, boracic lint, bandages and Lysol.

On the other hand if there is a common law duty upon employers to provide a first-aid outfit for the use of their employees in every case where the nature of the employment involves the risk of injury by accident it is very remarkable that counsel for the plaintiff was not able to refer us to any passage in any reported decision or in any text book where the existence of such a duty has been laid down. Section 200 of the Merchant Shipping Act, 1894, imposes upon owners of ships navigating between the United Kingdom and any place out of the same an obligation under sanction of a penalty to provide and cause to be kept on board a supply of medicine and medical stores according to scales issued by the Board of Trade. This is no modern enactment. A similar provision was contained in s. 18 of the Merchant Seamen Act, 1844. But so far as I am aware no obligation of this kind has been imposed by statute in regard to coasting vessels engaged solely in the home trade. If there is a common law obligation owed by the owners of such

vessels to their employees to provide medicines and medical stores it is very strange that no trace is to be found in the books of any action ever having been brought founded on such an obligation. One is tempted to cite a phrase from the judgment of FitzGibbon L.J. in *Dunbar v. Ardee Guardians* (1): "Upon this question there is a paucity of authority "which is almost unaccountable if the liability exists." In the well-known case of *Couch v. Steel* (2) a seaman employed on a foreign going ship claimed damages against the owner of the ship on foot of his neglect to keep on board a sufficient and proper supply of medicines and medicaments as a result of which the plaintiff complained that his health had suffered. The court held that the plaintiff was entitled to succeed on the ground that s. 18 the Act of 1844 created a statutory duty for the benefit of seamen and that a seaman suffering damage by breach of that duty could sustain an action against the owner of the ship. There is no suggestion in the report of the case that the plaintiff might have been entitled to recover at common law though the declaration seems to have been so widely framed that it could have covered a liability at common law as well as a liability based on the statute. The judgments in *Couch v. Steel* (2) have time and again been the subject of discussion and criticism in subsequent cases and in text books, and even the soundness of the decision itself that the plaintiff could sustain an action for damages on the ground of the defendant's failure to perform the duty cast upon him by the statute has from time to time been questioned. But in all the many discussions of the case it has never been suggested so far as I am aware that the plaintiff may have had a perfectly good action at common law quite apart from the statute. And the novelty of the present claim is not confined to actions against shipowners. Many cases must have occurred in factories and workshops where an injured employee's injury could have been mitigated by the availability of a first-aid outfit. It is only in com-

(1) [1897] 2 I.R. 76, 84. (2) (1854) 3 El. & Bl. 402.

paratively recent times that any obligation to provide such an outfit has been imposed by statute. If such an obligation existed at common law one would expect to find in the books reports of cases in which actions had been brought on foot of breaches of that common law obligation. But I have been unable to find in the reports a single instance of such an action ever having been brought. Moreover, in the many modern cases in which employers' duties to their employees have been discussed and expounded in detail there never appears to have been any suggestion made that an employer's duty at common law might include an obligation to provide first aid equipment. Nor have I found any suggestion of the existence of such an obligation in any of the text books.

These are no doubt negative considerations. But in view of the many actions which must have been sustainable if the liability contended for exists the absence of any trace of any action founded on the alleged liability is very striking and difficult to explain.

Inasmuch as I have come to the clear conclusion that in the present case the evidence adduced at the trial could not justify an inference that the plaintiff's present disability could be attributed to a failure (if failure there was) to provide antiseptics or other first-aid equipment, any decision on my part that there was a legal obligation upon the defendants to provide such equipment would be obiter. Accordingly, though I confess that on principle it is not easy to see any sound reason for declining to accept the conclusion arrived at by the Lord Chief Justice in regard to the legal liability, I think it better to refrain from expressing any concluded opinion on the matter having in mind the difficulties to which I have adverted and above all the difficulty of understanding how it comes that if the alleged obligation on the part of employers exists at common law no suggestion of the existence of and no trace of the enforcement of such an obligation is to be found in the books, although in the long history not only of merchant shipping but of factories and workshops thousands of instances must have

occurred which could have given rise to a claim based upon a breach of the obligation, if the obligation existed.

Appeal dismissed.

Solicitor for the appellant : *S. D. Crawford.*

Solicitors for the respondents : *McKinty & Wright.*

J.P.

MINISTER OF AGRICULTURE v. KELLY (1).

Emergency legislation—Importation of cattle—Notice of seizure—Time for display—Agriculture (Miscellaneous War Provisions) Act, 1940 (3 & 4 *Geo.* 6, *c.* 14)—*Livestock (Import from Eire and the Isle of Man) Regulations*, 1945 (*S. R. & O.*, 1945, *No.* 942), *reg.* 5 (3).

The Livestock (Import from Eire and the Isle of Man) Regulations, 1945, made under section 28 of the Agriculture (Miscellaneous War Provisions) Act, 1940, provide that upon the seizure of any livestock the authorized officer shall, as soon as practicable, display a seizure notice at the nearest police barracks so as to be visible to the public, and that he shall keep it so displayed between the hours of 10 a.m. and 4 p.m. each day for a period of 21 days.

Held by the Court of Appeal (Lord MacDermott L.C.J. and Black L.J., Porter L.J. dissenting), that the words "as soon as "practicable" mean as soon as practicable during the specified hours.

CASE STATED by the County Court Judge of the County of Armagh.

At Tynan petty sessions on June 30, 1952, an order was made under the Livestock (Import from Eire and the Isle of Man) Regulations, 1945, No. 942, forfeiting five bullocks claimed as his property by the defendant, and against this order the defendant appealed to quarter sessions. The cattle had been seized at 7-15 p.m. on May 5, 1952 by a constable of the Royal Ulster Constabulary, who then drove the cattle two miles to the nearest barracks, arriving there at 8-30 p.m. The constable said in evidence that he drafted the required notice that evening but did not post it until 9-5 a.m. the following morning. The county court judge held that the notice was not displayed as soon as practicable after the seizure and the question raised by the case was whether he was right in so holding.

Nicholson Q.C. and *Wilkinson* for the Minister.

Agnew Q.C. and *McGrath* for the defendant and respondent.

Cur. adv. vult.

(1) In the Court of Appeal before Lord MacDermott L.C.J. and Porter and Black L.JJ.; April 23; May 18, 1953.

LORD MACDERMOTT L.C.J.: This appeal arises out of proceedings brought by the complainant and appellant at Tynan Petty Sessions for the forfeiture of the proceeds of sale of five bullocks seized by an authorised officer under regulation 5 of the Live-stock (Import from Eire and the Isle of Man) Regulations, 1945, on May 5, 1952. The officer concerned was Constable David W. Johnston of the Royal Ulster Constabulary, and the seizure took place at 7-15 p.m. The constable drove the cattle two miles to the nearest police barracks at Middletown, County Armagh, arriving there at 8-30 p.m. He then drafted the seizure notice required by regulation 5 (3) but did not post it on the barrack notice board until 9-5 a.m. the next morning.

Regulation 5 (3), in so far as material, provides as ollows:

> "Upon the seizure of any livestock under sub-
> "section (2) hereof the authorised officer shall, as
> "soon as practicable, display . . . (*b*) in the case of
> "seizure in Northern Ireland, at the police barracks
> "nearest to the place of seizure, a notice in the form
> "set out in the Second Schedule to these Regulations
> "or to the like effect (hereinafter called a 'Seizure
> "'Notice') so as to be visible to the public, and
> "shall keep it so displayed between the hours of
> "10 a.m. and 4 p.m. each day for a period of 21
> "days."

The learned county court judge, on appeal from petty sessions, found that the seizure notice had not been displayed "as soon as practicable" after the seizure and he therefore reversed the order for forfeiture which had been made by the resident magistrate. The matter now to be considered is whether this finding was correct in law. If it was the consequential reversal of the order at petty sessions cannot be challenged.

This question appears to me to turn on the true construction of regulation 5 (3), and in particular on

the import of the words " as soon as practicable ". If this expression means " as soon as possible " the learned county court judge's decision must stand as it is clear on the facts that the notice of seizure could have been displayed late on May 5, or earlier on the following day than 9-5 a.m. In my view, however, such is not the true meaning of as " soon as practicable ". The word " practicable " is not synonymous with " possible ". In this context it must, I think, be taken to signify what is reasonable in the circumstances and appropriate to the requirements of the situation ; and those requirements include a display of the notice " so as to be visible to the public " and a continuation of the display for twenty one days " between the hours of 10 a.m. and 4 p.m. each day ".

These provisions preclude reading " possible " into the text since " as soon as possible " might result in the initial display taking place during the hours of darkness and so as not to be visible to the public. And it seems to me they also preclude an interpretation which would necessitate beginning the initial display (should the circumstances so permit) outside the specified hours of display. These hours, it may be assumed, were made fixed and definite in the regulation in order to give all persons concerned proper and sufficient notice of the seizure. It would be strange indeed if the first display might have to start outside the hours thus laid down, and the fact that the day of first display is not reckoned within the 21 days mentioned in regulation 5 (4) but emphasises the anomaly. Though regulation 5 (3) is perhaps not very happily drafted I do not think its language demands a construction having this effect. I think the requirement " as soon as practicable " is satisfied if the display is as soon as practicable during the specified hours. What was done here was within the regulation as so construed. I am therefore of opinion that the question submitted should be answered in the negative and that the case should be remitted with directions to hear and determine the same in accordance with law.

PORTER L.J.: At Tynan Petty Sessions on June 30, 1952 an order was made forfeiting five bullocks claimed by the defendant as his property, under the Livestock (Import from Eire and the Isle of Man) Regulations, 1945. The defendant appealed and the case came before the County Court Judge and Chairman of Quarter Sessions at Armagh Quarter Sessions on September 29, 1952.

The solicitor for the defendant raised a preliminary point that the notice required by regulation 5 (3) of the Regulations was not displayed as soon as practicable after the seizure of the cattle.

The only evidence was that of Constable Johnston, R.U.C., who stated that at 7-15 p.m. on May 5, 1952, he seized five bullocks two miles from the Middletown Barracks and drove them to the Barracks arriving there at 8-30 p.m., that he drafted the required notice that evening but did not post it on the notice board until 9-5 a.m. next morning. On cross-examination he stated that he could have posted it on the evening of the 5th. The county court judge held that the notice was not posted as soon as practicable after the seizure, and the question for this court is whether he was right in so deciding.

Regulation 5 (3) is as follows:

"Upon the seizure of any livestock under sub-"section (2) hereof, the authorized officer shall, "as soon as practicable display . . . in the case of "seizure in Northern Ireland, at the police barracks "nearest to the place of seizure, a notice in the "form set out in the Second Schedule to these "Regulations or to the like effect (hereinafter "called a 'Seizure Notice') so as to be visible to "the public, and shall keep it so displayed between "the hours of 10 a.m. and 4 p.m. each day for a "period of 21 days." After the cattle had arrived at the barracks, it would be reasonable to allow some time for them to be housed and perhaps fed, and also for the constable to fill in the required particulars in the seizure notice and have something to eat and drink, but making allowances for all that I cannot find any reason why the notice could not have been

displayed about 10 p.m. that evening. But, it may be asked, what is the use of posting up a notice at an hour when it may be so dark that no one would or could see it? Is it necessary that the notice should be displayed at any time before or after the prescribed period—10 a.m. to 4 p.m.? And if it must be displayed in the evening or the night or the early morning so as to comply with the words "as soon as practic-"able" must it be kept displayed until the commencement of the prescribed period—10 a.m.?

These are matters which may have to be settled on another occasion, but I do not think we are called upon to deal with them in the present case.

The words "as soon as practicable" occur in section 14 of the Workman's Compensation Act (Northern Ireland), 1927. That section provides that notice of the accident should be given to the employer as soon as practicable after the accident, and it is well settled that it is a question of fact whether the notice was or was not given as soon as practicable: *Fearnley Bros. v. Richmond* (1); *Evans v. Simpson* (2); *Owens v. Llay Main Collieries* (3); *Shannon v. Banbridge Weaving Coy.* (4).

The words also occur in section 9 of the Port of London (Port Rates on Goods) Provisional Order Act, 1910, and were the subject of a decision by Pickford J. in *Anglo-American Oil Co. Ltd. v. Port of London Authority* (5). Quantities of oil were required to be transhipped as soon as practicable after their arrival in the Port of London. Pickford J. held that the words meant as soon as practicable in the course of navigation and having regard to the facilities of the port, and not as soon as practicable with regard to the convenience of the merchant's business.

The words "*Upon* the seizure of any livestock . . . "the authorized officer shall *as soon as practicable* "display" obviously mean that there should be no

(1) (1925) 18 B.W.C.C. 81.
(2) (1926) 19 B.W.C.C. 407.
(3) (1932) 25 B.W.C.C. 573.
(4) (1910) 45 I.L.T.R. 74.
(5) [1914] 1 K.B. 14.

unnecessary delay between the seizure of the cattle and the display of the notice. If the words were intended to have the meaning now attributed to them by the Minister, they are quite superfluous and ought to be omitted from the regulation which would then run somewhat as follows: The notice must be kept displayed so as be visible to the public between the hours of 10 a.m. and 4 p.m. each day for the 21 days following the seizure. The cattle were seized at 7-15 p.m. on the 5th May and the notice was not displayed until 9-5 a.m. on the 6th May, that is to say almost 14 hours after the seizure.

The constable gave no reason for such a long delay but admitted that he could have posted the notice on the evening of the seizure. There was no suggestion that the notice if posted that evening would not have been visible to the public. On the evidence of the constable, which was the only evidence given on this preliminary point, the county court judge, in my opinion, was clearly right in holding that the notice was not displayed as soon as practicable after the seizure of the cattle.

In any event the question is one of fact and I think we shall not disturb the finding of the county court judge.

BLACK L.J.: By regulation 5 (2) of the Livestock (Import from Eire and the Isle of Man) Regulations, 1940 (S.R. & O. 1940, No. 1500) as amended by the Amending Regulations of 1941 (S.R. & O. 1941, No. 1430) it was provided that when an authorised officer had seized any livestock in Northern Ireland under the powers conferred by the Regulations he should, as soon as practicable, display a seizure notice at the police barracks nearest to the place of seizure so as to be visible to the public and should keep it displayed there for twenty-eight days.

The Regulations of 1940 as so amended were revoked by the Livestock (Import from Eire and the Isle of Man) Regulations, 1945 (S.R. & O., 1945, No. 942). Regulation 5 (3) of these Regulations, which is the regulation which we have particularly to consider in

the present case directs that upon the seizure of any livestock by an authorised officer in Northern Ireland, he shall, as soon as practicable, display a seizure notice at the police barracks nearest to the place of seizure so as to be visible to the public and shall keep it so displayed between the hours of 10 a.m. and 4 p.m. each day for a period of twenty-one days.

It will be noticed that two changes have been effected by the Regulations of 1945. In the first place the period during which the seizure notice is to be kept displayed is shortened from twenty-eight days to twenty-one days. And in the second place the 1945 Regulations only require the notice to be kept displayed between the hours of 10 a.m. and 4 p.m. during that period of twenty-one days, whereas under the 1940 Regulations it was to be kept displayed (apparently continuously) for twenty-eight days and not merely during certain limited hours.

It was submitted by the defendant that the effect of the provisions of the Regulations of 1945 was that if a seizure took place at an hour when it was not practicable for the authorized officer to display a seizure notice before 4 p.m. he was nevertheless under an obligation to display the notice as soon as reasonably possible. Thus if it were reasonably possible for him to display the seizure notice before (say) 9 p.m. he was bound to do so. On behalf of the Minister on the other hand, it was argued that according to the true meaning and intendment of the Regulations it would be sufficient for him to place the notice on display at any time before 10 a.m. the next day.

The defendant's counsel contended that the interpretation which the defendant sought to put on the regulation was the natural meaning which the words of regulation 5 (3) of the Regulations of 1945 in their ordinary significance bore. They were constrained however to concede that there was nothing in the Regulations to compel the seizure notice to be kept displayed for any periods except between the hours of 10 a.m. and 4 p.m. and that if the first time at which it was reasonably possible for the authorized officer

to display the notice was (say) 9 p.m. he would, according to their construction of the Regulations, sufficiently comply with the requirement that the notice should be displayed as soon as practicable by displaying it at 9 p.m. for a couple of minutes and then taking it down until 10 a.m. the following day. On behalf of the Minister it was submitted that this would be an absurdity: that it would be ridiculous and pointless to require a notice to be posted up if it could be taken down after a couple of minutes and before it had served any possible purpose: and that the court should be slow to attribute to a statutory regulation such an absurd effect.

I confess that I have felt some doubt about the case and that I have considerable sympathy for the view that the court should be reluctant to construe in favour of a Government Department a regulation emanating from the Department which has been loosely drafted. On consideration, however, I have come to the conclusion that the view taken by the Lord Chief Justice of the effect of the regulation is to be preferred. In construing a phrase contained in a statute or a statutory regulation one must look at the statute or regulation as a whole in order to ascertain the legislative intent. Under the Regulations of 1940 (as amended in 1941) I think that there would be a strong case for construing the words "as soon as practicable" in the way in which the defendant contends in the present case they should be construed in the Regulations of 1945, inasmuch as under the Regulations of 1940 and 1941 there were no hours limited for the display of the seizure notice. Apparently when once it was displayed it was to be kept on display continuously day and night. But under the Regulations of 1945 there are fixed hours for display—10 a.m. to 4 p.m. If the defendant's contention is correct that in a case in which the notice could first be displayed at some time outside these hours, it ought to be then displayed, I see no escape from the conclusion that the requirement of the regulation would be sufficiently complied with by displaying the notice for only a minute or so and then taking it down. And I entirely agree with the argu-

ment on behalf of the Minister that a requirement of this nature would be pointless and absurd. It is a well established principle in the interpretation of statutes that where a construction which may be the strictly literal one leads to a manifest absurdity a construction may be adopted which harmonises with the context and which will carry out what may be reasonably inferred from the wording of the statute to have been the legislative intent: *Hawes v. Paveley* per Jessel M.R. (1): *Higham v. Wright* per Grove J. (2). A reasonable construction should if possible prevail. And this principle has been applied in the construction of penal Acts where a strictly literal construction would have enabled the defendant to escape the penalty but would have produced a manifest absurdity: *Williams v. Evans* :(3) *Attorney-General v. Beauchamp* (4). I think the words "as soon as practicable" in regulation 5 (3) of the Regulations of 1945 must be construed having regard to the obvious object of regulation 5 (3) and to the mode in which regulation 5 (3) seeks to carry that object into effect. Construing the words in this way I come to the conclusion that when cattle are seized and by reason of the time or other circumstances of the seizure it is not practicable to put the seizure notice on display before 4 p.m. on the day of the seizure, the requirement that the seizure notice be displayed as soon as practicable will be sufficiently complied with if the notice is put on display before 10 a.m. the commencement of the prescribed hours of display on the following day.

Appeal allowed.

Solicitor for the Minister: *Chief Crown Solicitor.*

Solicitor for the defendant and respondent: *J. G. Lennon.*

S.M.M.

(1) (1876) 1 C.P.D. 418, 419.
(2) (1877) 2 C.P.D. 397, 400.
(3) (1876) 1 Ex. D. 277.
(4) [1920] 1 K.B. 650.

BELFAST CORPORATION v. KELSO (1).

Public Health—Regulation of Piggeries—Byelaw prohibiting keeping swine within specified distance of dwelling-house—Whether "dwelling-house" includes curtilage—Construction of byelaw.

For the purposes of article 1 of the Belfast Corporation Byelaws for the Regulation of Piggeries, made under s. 54 of the Public Health (Ireland) Act, 1878, which prohibits the keeping of swine within fifteen feet of any dwelling-house, the term 'dwelling-house" means the dwelling-house strictly so-called, and does not include the curtilage or yard.

CASE STATED by the Recorder of Belfast.

At Belfast petty sessions held on June 24, 1952 the appellants by summons issued on May 14, 1952, complained that the respondent "being the occupier "of premises No. 61, Conlig Street, Belfast, did within "the past six months at said premises keep swine "within a distance of fifteen feet from the dwelling-"houses known as Nos. 80 and 82, Fortingale Street "and No. 63, Conlig Street in the County of the City "of Belfast, contrary to the byelaws made on May 1, "1894, for the Regulation of Piggeries."

The resident magistrate held that an offence had been committed and fined the respondent ten shillings. The Corporation appealed to the Recorder of Belfast who reversed the decision of the resident magistrate.

The Recorder found the following facts.

The enclosure where the swine were kept was 20 feet 6 inches distant from the adjoining dwelling-house, No. 63, Conlig Street and 8 feet from the boundary wall at the rere of the dwelling-houses Nos. 82 and 84, Fortingale Street. The boundary wall was 1 foot $1\frac{1}{2}$ inches thick and the scullery of each house was 6 feet from the boundary wall, making a total distance of 15 feet $1\frac{1}{2}$ inches from the enclosure to the scullery. The Recorder held that the word 'dwelling-house' in the byelaw meant the dwelling-house proper and did not include the yard or curtilage and that accordingly

(1) In the Court of Appeal before Lord MacDermott L.C.J. and Porter and Black L.JJ.; April 23, May 15, 1953.

the respondent had not committed the offence complained of, but stated this case for the opinion of the Supreme Court.

Patton Q.C. and *Reid* for the appellants.

Hanna Q.C. and *Kelly* for the respondent.

Cur. adv. vult.

LORD MACDERMOTT L.C.J.: The judgment which Black L.J. is about to deliver is the judgment of the court.

BLACK L.J.: By article 1 of the Byelaws for the Regulation of Piggeries made by the Belfast Corporation on May 1, 1894, under the powers conferred upon urban authorities by section 54 of the Public Health (Ireland) Act, 1878, it is provided as follows:

> "The occupier of any premises or the owner "of any swine shall not keep said swine or deposit "any swine's dung within the distance of 15 feet "from any dwelling-house, or in such a situation "or in such a manner as to pollute any water "supplied for use, or used, or likely to be used, "by man for drinking or domestic purposes, or "for manufacturing drinks for the use of men, "or any water used or likely to be used in any "dairy."

The question for determination in the case is the meaning to be given to the word 'dwelling-house' in this byelaw.

The respondent was prosecuted by the Corporation on a charge of keeping swine within a distance of fifteen feet from the dwelling-houses known as Nos. 80 and 82 Fortingale Street and No. 63 Conlig Street in the City of Belfast contrary to the byelaws. Having been convicted at petty sessions he appealed, and upon the hearing of the appeal the Recorder of Belfast reversed the conviction and dismissed the complaint.

From the facts set out in the case stated it appears that the respondent keeps a considerable number of swine in an enclosure in a yard situated at No. 61

Conlig Street, Belfast. No part of this enclosure is within 15 feet of any part of the premises No. 63 Conlig Street, and accordingly so far as the charge related to No. 63 Conlig Street it could not be sustained. The rere of the yard of No. 61 Conlig Street where the enclosure is situated in which the respondent keeps the swine, abuts immediately on the rere of certain premises fronting on Fortingale Street and numbered 82, 84 and 86 Fortingale Street. These premises fronting on Fortingale Street consist of a number of dwelling-houses each with a small back yard at the rere of the dwelling-house proper. The only access to these yards is by a door opening out of the scullery of the house to which the yard belongs. The lavatory belonging to each of these houses is situated in the yard of the house. These lavatories do not form part of the main buildings of the houses but are separate structures some feet away from the main buildings.

As regards No. 82 Fortingale Street, the enclosure in which the respondent keeps the swine is only 8 feet distant from the boundary wall at the rere of the yard of No. 82 but it is 15 feet $1\frac{1}{2}$ inches distant from the wall of the scullery of No. 82 which is the nearest part of the actual house No. 82 to the enclosure. The lavatory in the yard of No. 82 is about 13 feet distant from the enclosure. As regards No. 80 Fortingale Street the actual distances are not given in the case stated but it would appear from the sketch plan appended to the case that the enclosure in which the swine are kept is less than 15 feet from the boundary wall at the rere of the yard of No. 80 but is more than 15 feet from the nearest point of the actual house itself. The contention of the Corporation was that the distance of 15 feet prescribed by the byelaw should be measured from the enclosure to the boundary yard walls of the houses in Fortingale Street, or, in the alternative, to the lavatories in the yards of those houses. The respondent, on the other hand, contended that the word ' dwelling-house ' in the byelaw meant the actual dwelling-house and did not include the yard so that the distance of 15 feet should be measured in each case from the wall of the scullery

which was the nearest point of the actual dwelling-house to the enclosure.

The Recorder accepted the contention of the respondent and held that the word ' dwelling-house ' in the byelaw meant the actual dwelling-house, and did not include the yard or the lavatory situated in the yard. He accordingly allowed the respondent's appeal, but, at the instance of the Corporation, stated the present case for the opinion of this court.

The question is a narrow one, but that does not mean that it is easy of solution. Unfortunately, little assistance is to be had from statute or authority. No definition of the term dwelling-house is to be found either in the byelaws themselves or in the Public Health (Ireland) Act, 1878, under the authority of which they were made. It is not difficult to see that the word dwelling-house may be used in different senses in different connections. Thus we may speak of a garden attached to or surrounding a dwelling-house. In this sense by ' dwelling-house ' we mean only the dwelling itself, the actual bricks and mortar. On the other hand, a conveyance or a devise of a dwelling-house would normally be construed as including all the land within the curtilage of the house. It is obvious that the meaning of the term may vary according to the purpose and intention of the context in which the term is used. In the present case the purpose of the byelaws is to safeguard the public health by preventing the keeping of swine close to premises in which people have to live. If we construed the term in the byelaws in the same way in which we would ordinarily construe it in a conveyance or a will we would be led to what would seem anomalous results from the public health point of view. While it would be legitimate to keep swine a little more than 15 feet from the back yard walls of houses in a densely populated district of the city, a householder whose garden ran down a distance of perhaps 100 or 200 feet from the back of his house would, on this interpretation of the word, obtain a very much greater measure

of protection for his house itself than his fellow citizens living in more congested districts.

Various arguments were put forward on either side founded on inferences which, it was claimed, could be drawn from provisions in the Public Health Acts and the Belfast Corporation Acts. Thus both appellants and respondent sought to found themselves on the provision contained in section 57 of the Public Health (Ireland) Act, 1878, making it an offence to keep any swine or any pig stye in any dwelling-house. This section is obviously copied from section 47 of the English Public Health Act of 1875, where, however, the provision is applied only to urban districts. It is in terms a reproduction of section 59 of the old Public Health Act of 1848. From the wording of the section the appellants contended that the word dwelling-house, as used in section 57 (and consequently as used in byelaws made under section 54), must mean more than a dwelling-house in the strict sense contended for by the respondent, for although it is possible to conceive of the keeping of swine in a dwelling-house it is, they said, hard to conceive of the erection of a pig stye inside a dwelling-house. But though one usually thinks of a pig stye as something in the nature of a small house or shed, it is defined in the dictionaries in general terms as a pen or enclosure for pigs, and accordingly this argument, founded on the use of the word pig stye in section 57, cannot carry much weight. The respondent, on the other hand, sought also to draw support from this provision in section 57 for the meaning which he contends must be given to the word dwelling-house in the byelaws of 1894. Article 6 of these byelaws provides (inter alia) that swine shall not be kept in any premises to which there is not a back entrance, and that all dung, manure, soil or filth shall be removed and taken away by the said back entrance and not through any portion of the premises occupied as a dwelling-house. This byelaw, it is said, was directed (as it probably was) against keeping swine in back yards of dwelling-houses which had no back door opening to a passage at the rere. If (so the argument runs) the authors of the byelaws had

thought that section 57 forbade the keeping of swine in the back yard or curtilage of a dwelling in the city as well as in the dwelling-house itself, it would have been unnecessary for them to have enacted these provisions of article 6 inasmuch as the situation contemplated by that article could not have lawfully arisen. Accordingly, it is contended that when using the word dwelling-house in the byelaws they must have intended the term to bear the narrow meaning of the dwelling-house proper apart from the yard or curtilage. This is an ingenious argument, but it can hardly be considered one to which we would be disposed to attach any decisive weight.

Another argument was sought to be founded by the appellants on the provisions of section 124 of the Belfast Corporation Act, 1845, which enacts "that the "Owner of every Dwelling-house to be hereafter "erected shall provide and attach to each such House "a Yard of not less than Ten Feet in Depth from the "rear Wall of such House, and build, provide, and "maintain a suitable Necessary House for the Use of "the Occupants of such House, and the same shall be "provided and built and be sufficiently screened and "fenced off to the Satisfaction of the Council or their "Officer." It was argued that inasmuch as by reason of this section the provision of a yard was essential to every dwelling-house erected in Belfast after 1845 it followed that when a byelaw made in 1894 referred to dwelling-houses it referred to units of which a yard was a necessary and integral part. Two reflections, however, present themselves on consideration of this argument. In the first place, the Act does not define the word 'yard'. One accustomed to traditional housing in Belfast will, no doubt, ordinarily think of a yard as a space at the rere of a dwelling-house enclosed by brick walls, the side walls of the yard being simply a continuation at a height of about eight to twelve feet of the side walls of the dwelling-house proper. But walls are not an essential feature of a yard. A yard may well be enclosed by a fence or even by a hedge. It is a matter of common knowledge that

many modern houses in the suburbs of Belfast with a plot of ground or a garden at the rere have been built without anything in the nature of the traditional walled-in yard. In the case of such properties is the distance from the dwelling-house referred to in article 1 of the byelaws of 1894 to be measured from the hedge or fence? In the second place, the actual wording of section 124 seems to incline against construing the section as including the yard in the term dwelling-house. The section enacts that the owner of every dwelling-house shall provide and attach a yard to each such house. This does not seem to contemplate the yard as being part of the dwelling-house but rather as being something to be attached to it. The section then goes on to say that the yard shall be not less than ten feet in depth from the rere wall of the house. The word house here must mean the actual structure of the house proper and obviously cannot be construed as including the yard. It seems to me that if and in so far as section 124 of the Act of 1845 may be legitimately looked to for assistance in the construction of the word dwelling-house in the byelaws of 1894, it points rather against instead of in favour of the view put forward by the Corporation. Not only does section 124 treat the yard as something distinct from the house but the wording which it uses in directing the provision of a necessary house appears to contemplate that the necessary house shall—or at any rate may—be a building separate and apart from the dwelling-house itself. In the circumstances obtaining in 1845 it was probably considered desirable to have the necessary house built well away from the dwelling-house proper. If resort is to be had to section 124 for guidance it would seem by the wording of its direction for the provision of necessary houses to tend against the Corporation's alternative contention that the lavatories in the yards of the houses in Fortingale Street are to be treated for the purposes of the byelaws as part of the dwelling-houses.

The only reported case to which we were referred

bearing any resemblance to the present case is *Wright v. Wallasey Local Board* (1). That case turned on the provisions of section 9 of the Burial Act, 1853, which enacted that no ground not already used as or appropriated for a cemetery should be used for burials within the distance of one hundred yards from any dwelling-house without the consent of the owner. The defendants had buried a body or bodies at a distance of 102 yards from the plaintiff's cottage, measured from the walls of the cottage, but within 100 yards of the curtilage belonging to it, the curtilage being a piece of unenclosed ground round the cottage. A. L. Smith J. held that the word dwelling-house did not, for the purposes of the Act, include the curtilage, and therefore that the specified distance must be measured from the walls of the dwelling-house. He relied very much on the same considerations as have weighed with us in this case. He says: "First, why "was the 100 yards limit enacted? It seems to me "clearly, as was stated by Jessel M. R. in *Lord Cowley* "*v. Byas* (2), with a view to the health of the public. "Secondly, this 100 yards limit is, as was pointed out "by the same learned judge in the same case, a "privilege to a landowner to prevent his neighbour "using his own land as he would otherwise be entitled "to but for the statutory limit. Then why, I would "ask, is the statutory obligation, which is imposed "on a man's neighbour, to be extended or diminished "by reason of the largeness or smallness of the curtilage "belonging to the man seeking to impose the obligation "upon his neighbour?".

This, it appears to us, points to the real difficulty in the way of the Corporation. If the yard or enclosure at the rere of the house is bounded by a wall and if the 15 feet prescribed by the byelaw is to be measured from the wall, what is the position if the enclosure is bounded not by a wall but by a fence or hedge? Is it to be measured from the fence or hedge no matter

(1) (1887) 18 Q.B.D. 783, 785. (2) (1877) 5 Ch.D. 944, 951.

what the distance of that fence or hedge may be from the house itself? Or even if the enclosure is bounded by a wall, is the 15 feet to be measured from the wall in a case where the boundary wall is a substantial distance from the house itself? If the byelaw is to be interpreted reasonably then it seems to us that, unless one adheres to the meaning of the word dwelling-house as the dwelling-house strictly so called, it will be very difficult to lay down any clear rule as to where the line is to be drawn.

To put the case at its very highest in favour of the Corporation we think they are bound to concede that there is at least an ambiguity—a real ambiguity—regarding the meaning to be given to the word dwelling-house in the byelaw. If that is so, then upon well established principle the respondent, against whom the Corporation are seeking to enforce the penalty prescribed by the byelaws, is entitled to have the ambiguity resolved in his favour.

We are therefore of opinion that the decision of the learned Recorder on the several points set out by him in paragraph 8 of the case stated was correct in law, and that the question submitted by him for the opinion of this court should be answered accordingly.

Appeal dismissed.

Solicitor for the appellants: *Samuel Love.*

Solicitors for the respondent: *Tughan & Walmsley.*

S.M.M

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CRIMINAL LAW — DISORDERLY BEHAVIOUR—" *Any place to which the " public have or are permitted to have " access "—Admission to dance hall on payment—Summary Jurisdiction and Criminal Justice Act* (*Northern Ireland*), 1935, 25 & 26 *Geo.* 5, *c.* 13), *s.* 59. Section 59 of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, provides penalties for riotous, disorderly and indecent behaviour " in any . . . . place to which " the public have or are permitted to " have access." *Held*, that neither the fact that a charge is made for admission to a dance hall nor the fact that the right to refuse admission is reserved is sufficient of itself to constitute those who gain admission a limited class distinguishable from the general public so as to deprive the hall of the character of a " place to which the public have " or are permitted to have access." Per Black L.J. Where words and phrases used in an Act of Parliament are taken from earlier statutes dealing with similar subject matter and these words and phrases have received judicial interpretation the presumption is that Parliament intended them to bear the meaning which has been judicially attributed to them, and this presumption is equally applicable when statutes of the Parliament of Northern Ireland have used words palpably taken from statutes of the United Kingdom which have been interpreted by the English courts. *Russell v. Thompson* .. .. .. [C.A. 51

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EMERGENCY LEGISLATION—*Importation of cattle—Notice of seizure—Time for display—Agriculture* (*Miscellaneous War Provisions*) *Act*, 1940 (3 & 4 *Geo.* 6, *c.* 14)—*Livestock* (*Import from Eire and the Isle of Man*) *Regulations*, 1945 (*S. R. & O.*, 1945, *No.* 942), *reg.* 5 (3). The Livestock (Import from Eire and the Isle of Man) Regulations, 1945, made under section 28 of the Agriculture (Miscellaneous War Provisions) Act, 1940, provide that upon the seizure of any livestock the authorized officer shall, as soon as practicable, display a seizure notice at the nearest police barracks so as to be visible to the public, and that he shall keep it so displayed between the hours of 10 a.m. and 4 p.m. each day for a period of 21 days. *Held* by the Court of Appeal (Lord MacDermott, L.C.J. and Black L.J., Porter L.J. dissenting), that the words " as soon as " practicable " mean as soon as practicable during the specified hours. *Minister of Agriculture v. Kelly*. .. [C.A. 151

MASTER AND SERVANT—*Duty of employer to take reasonable care for safety of workman—Extent of duty—Whether employer bound to provide means for mitigating consequences of foreseeable accidents.* The plaintiff, a seaman on a small coastal steamer, suffered a wound to his finger as the ship was leaving port for a voyage of about eighteen hours duration. Later the wound became septic and the plaintiff was incapacitated for work and suffered some permanent injury. The wound was caused by a steel rope supplied by the employers, but the jury found that the employers were not negligent in failing to take care to provide and maintain proper appliances for working the ship. The plaintiff had averred that the ship was not adequately supplied with first-aid equipment and that this fact contributed to the disability which the wound caused, but the trial judge ruled that there was no duty on the employers to provide medical appliances for the use of the crew and declined to leave any questions to the jury on this issue. *Held* by the Court of Appeal (Lord MacDermott L.C.J. and Porter L.J., Black L.J. dubitante) that the trial judge was wrong in so ruling. The duty imposed at common law on a master to take reasonable care for the

safety of his workmen may in certain circumstances go beyond the prevention of injury and oblige him to make provision for avoiding or mitigating the foreseeable consequences of injury. *Held*, however, that, as there was no evidence on which the jury could find that any negligence of the defendants in failing to provide medical appliances contributed to the plaintiff's disability, the verdict and judgment in favour of the defendants should not be disturbed. *Smith v. Howdens, Ltd.* .. [C.A. 131

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NORTHERN IRELAND—CONSTITUTIONAL LAW—*Validity of statute—Act of Northern Ireland Parliament purporting to limit business of furniture removers—"take any property without "compensation"—Government of Ireland Act*, 1920 (10 & 11 *Geo.* 5, *c.* 67), *s.* 5 (1)—*Transport Act* (*Northern Ireland*), 1948 (12 & 13 *Geo.* 6, *c.* 16), *ss.* 18, 19. S. 5 (1) of the Government of Ireland Act, 1920, prohibits the Parliament of Northern Ireland making a law so as either directly or indirectly to take any property without compensation. S. 18 (1) of the Transport Act (Northern Ireland), 1948, prohibits the use by any person other than the Ulster Transport Authority of a motor vehicle on a public highway to carry for reward any passengers or luggage or merchandise except with the consent of the Authority and the approval of the Ministry of Commerce. S. 19 (1) excepts from the restrictions imposed by s. 18 (1) the use by furniture removers of motor vehicles "to "move furniture or effects, not being "part of the stock in trade of the "owner thereof, from or to premises "occupied by such owner to or from "other premises occupied by such "owner or to or from a store." Furniture which had been purchased as stock in trade by a dealer at an auction mart was carried by the respondents, a firm of furniture removers, from the mart to the dealer's premises without the consent of the Authority and without the approval of the Ministry. In answer to a summons for an offence against s. 18 (1) it was contended by the respondent that this section was ultra vires the Parliament of Northern Ireland in that it was a taking of property without compensation contrary to s. 5 (1) of the Act of 1920. *Held*, by the Court of Appeal (Lord MacDermott L.C.J., Porter and Black L.JJ.), that the respondents' interest in continuing to carry on furniture removal work of the type prohibited by s. 18 (1), as modified by s. 19 (1), whether such interest was to be regarded as goodwill or as an interest distinct from goodwill, was property within the meaning of s. 5 (1) of the Act of 1920. The word "property" in s. 5 (1) of the Government of Ireland Act, 1920, is not to be restricted to tangible property *ejusdem generis* as the other forms of property mentioned in that section. *Held*, further, that since the intention of the Act of 1948 was to divert to the Authority the business which was prohibited to the respondents there was a taking over of property belonging to the respondents without compensation, and that accordingly s. 18 (1) of the Act of 1948 was ultra vires in so far as it purported to prohibit the use of a motor vehicle for the collection or delivery of furniture by a person in connection with his business as a remover or storer of furniture. *Quaere* whether a taking of property by dissipation or destruction without a "taking over", or a negative prohibition which merely interferes with the enjoyment of property, is a taking of property within the meaning of s. 5 (1) of the Act of 1920. *Semble* that the decision of the Court of Appeal in Northern Ireland in *Northern Ireland Transport Board v. Benson* [1940] N.I. 133 is not binding as an authority since the judgments were pronounced without jurisdiction. Observations on the proper form of order where legislation of the Parliament of Northern Ireland is held to be ultra vires as regards some particular subject matter, activity or application. Decision of a Divisional Court of the Queen's Bench Division (Sheil and Curran JJ.) affirmed. *Ulster Transport Authority v. James Brown & Sons, Ltd.* .. .. .. [C.A. 79

PLANNING — DEVELOPMENT — *Proposed use of dwelling-house as residential rescue home for girls—Use of premises for different purpose—Planning* (*Interim Development*) *Act* (*Northern Ireland*), 1944 (7 & 8 *Geo.* 6, *c.* 3), *s.* 9 (1). The trustees of a charity proposed to

use premises previously used and occupied as a dwelling-house with grounds for establishing there a residential rescue home for girls. *Held*, that use for such a purpose would constitute a development within the meaning of s. 9 (1) of the Planning (Interim Development) Act (Northern Ireland), 1944. *Holland & Ors v. Antrim County Council* .. [Ch. D. 1

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——STRIKING OUT PLEADING—*Motion to strike out statement of claim as raising matters previously decided—Grounds for relief not in issue in previous proceedings —Previous statement of claim struck out as unintelligible. Practice—Costs—Costs of previous actions not paid—Jurisdiction of court to order stay—Jurisdiction of court to order security for costs. Pleading—Conveyance — Averment that one party was mentally incapable—Necessity for averment that incapacity was known or should have been known by other party.* The plaintiff commenced an action to set aside a conveyance of certain lands by his father to the defendant in 1947 on the grounds of the father's mental incapacity. The defendant sought to have the statement of claim struck out on the ground that it sought to raise anew questions already decided between the parties by a court of competent jurisdiction and was an abuse of the process of the court; alternatively that it disclosed no reasonable cause of action and was frivolous and vexatious; alternatively that the plaintiff should give security for the defendant's costs. In support of his application the defendant deposed that the conveyance of 1947 had been in issue before the courts on four occasions, viz. (i) proceedings by equity civil bill in 1948 by the father against the defendant which were settled on the footing that if the father paid £500 between November 1, 1948, and December 31, 1948 (a condition which was not fulfilled) the defendant would convey the lands to the plaintiff or his nominee; (ii) proceedings for trespass on the lands in question begun by the defendant in April 1949 against the father and the plaintiff in which the defendant was awarded damages and granted an injunction against the father and the plaintiff; (iii) proceedings in ejectment begun by the defendant in October 1949 after the death of the father in which the defendant obtained an order for possession against the plaintiff; (iv) proceedings begun by the plaintiff in the High Court in 1950 for possession of deeds and damages on the footing that the conveyance of 1947 was intended to be a mortgage, in which the statement of claim was struck out on the grounds (*a*) that it sought to raise anew matters already decided by a court of competent jurisdiction; (*b*) that it was unintelligible, frivolous and vexatious, (*c*) that it disclosed no cause of action. The defendant further deposed that he had never succeeded in recovering any of the costs awarded to him in the three last mentioned proceedings. *Held*, that the issue raised in the present action, viz. the mental incapacity of the father, was not an issue raised in the equity civil bill proceedings or in the ejectment proceedings, and in so far as it was raised in the previous High Court proceedings it was contained in a pleading which was struck out as unintelligible, and accordingly the present claim should not be struck out as seeking to raise anew matters already decided. An order striking out a claim as unintelligible and accordingly dismissing the action is no bar to a subsequent action putting forward an intelligible claim. *Held*, further, that the fact that the grounds for relief now put forward by the plaintiff were not relied on by the father in the equity civil bill proceedings, or by the father or by the plaintiff in the trespass proceedings, or by the plaintiff in the ejectment proceedings was no ground for dismissing the present action. A claim for equitable relief is not barred by a judgment in an earlier suit seeking the same relief but based on a different equity. *Semble* that section 96 of the Civil Bill Courts (Ireland) Act, 1851, does not entitle a defendant to raise an equitable defence based on an equity which would not entitle him to simple and unconditional relief. *Held*, further, that though the effect of the plaintiff's case was to assert that the conveyance of 1947 was

merely voidable, neither the institution by the father of the equity civil bill proceedings nor his consent to the agreement by which those proceedings were settled amounted to an acceptance and confirmation of the position that he was mentally competent to enter into and understand business transactions. *Held*, further, that since the present action was not substantially the same as any previous action between the parties, even though arising out of the same transaction, there was no jurisdiction to stay the present action on the ground that the costs given against the plaintiff in previous actions had not been paid, nor was there any jurisdiction to order the plaintiff to give security for costs in the present action. *Held*, however, that the plaintiff's statement of claim disclosed no cause of action since it omitted to aver that the defendant knew or should have known of the mental incapacity of the father, and that accordingly the statement of claim must be set aside, reserving liberty to the plaintiff to deliver an amended statement of claim. *Mulgrew v. O'Brien* .. [Q.B.D. 10

PUBLIC HEALTH—*Regulation of Piggeries—Byelaw prohibiting keeping swine within specified distance of dwelling-house—Whether "dwelling-house" includes curtilage—Construction of byelaw.* For the purposes of article 1 of the Belfast Corporation Byelaws for the Regulation of Piggeries, made under s. 54 of the Public Health (Ireland) Act, 1878, which prohibits the keeping of swine within fifteen feet of any dwelling-house, the term "dwelling-house" means the dwelling-house strictly so-called, and does not include the curtilage or yard. *Belfast Corporation v. Kelso* .. .. .. [C.A. 160

REVENUE—CUSTOMS—*Motor vehicle suspected of carrying uncustomed goods—Failure to stop at request of officer—Whether vehicle liable to forfeiture—Irish Free State (Consequential Provisions) Act*, 1922 (13 *Geo.* 5, *sess.* 2, *c.* 2), *s.* 4—*Customs (Land Boundary) Regulations*, 1933 (*S.R. & O.*, 1933, *No.* 240), *reg.* 12 (2) (2). Section 4 (1) of the Irish Free State (Consequential Provisions) Act, 1922, provides for the making of regulations with reference to the importation and exportation of goods into and from Northern Ireland otherwise than by sea or aircraft, and section 4 (2) provides that if any person contravenes or fails to comply with such a regulation he shall be guilty of an offence and prescribes penalties, and further provides that "the goods in respect of which the "offence is committed shall be for-"feited." By regulation 12 (2) (2) of the Customs (Land Boundary) Regulations, 1933, made under the aforementioned section every person in charge of any merchandise or of any vehicle travelling within twenty miles of the boundary shall upon request by a customs officer stop such merchandise or vehicle and allow the officer to examine the same and the goods therein and to take an account thereof. A motor van being driven within twenty miles of the boundary failed to stop when signalled so to do by a customs officer who suspected it was being used or the carriage of uncustomed goods. It was later stopped by the police who found that it was not carrying uncustomed goods. *Held*, that the provision in section 4 relating to forfeiture of "the goods in respect of which the "offence is committed" did not apply to the van since there was no infringement of the regulations with respect to the importation or exportation of the van, and that accordingly the van was not liable to forfeiture. *Fitzharris v. Strain* .. .. .. [C.A. 70

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